Supreme Court, U.S.
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No. ——

In The Supreme Court of the United States

October Term, 1994

Christine Williams and Citizens for Life,
Petitioners,

v.

Planned Parenthood Shasta-Diablo, Inc.,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of California

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In a decision issued prior to this Court's decision in *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994), the Supreme Court of California upheld an injunction banning peaceful pro-life picketing and sidewalk counseling on a public sidewalk adjacent to respondent's abortion facility. The state supreme court applied the "time, place, and manner" test, App. 6a-7a, and ruled that, while access was not at issue, the ban was necessary to "mitigate the emotional impact" of petitioners' expressive activities upon respondents' clientele, App. 20a; *id.* at 16a. In *Madsen*, this Court held that the "time, place, and manner" test is "not sufficiently rigorous" to use in evaluating injunctive restrictions on expressive activities, 114 S. Ct. at 2525, and that a speech-free "buffer zone" is unconstitutional unless necessary to prevent unlawful obstruction of access to a facility, *id.* at 2528.

1. Should this Court summarily reverse in light of *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994), or, in the alternative, grant review, vacate the decision below, and remand for further consideration in light of *Madsen*?

2. Does an injunction completely banning all "picketing, demonstrating or counseling" on a public sidewalk unconstitutionally restrict more speech than is necessary, where the injunction is not needed to prevent obstruction of access?

3. Did the court below err by holding that the goal of mitigating "emotional trauma" justifies an injunction completely banning all "picketing, demonstrating or counseling" on a public sidewalk?

PARTIES

The names of all of the parties to the proceeding in the court below appear in the caption of the case.

Neither of the petitioners is a corporation. *See* Rule 29.1.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. ———

CHRISTINE WILLIAMS and CITIZENS FOR LIFE,
Petitioners,

v.

PLANNED PARENTHOOD SHASTA-DIABLO, INC.,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of California

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PETITION FOR WRIT OF CERTIORARI

DECISIONS BELOW

The decision of the Supreme Court of California is reported as *Planned Parenthood Shasta-Diablo, Inc. v. Williams,* 7 Cal. 4th 860, 873 P.2d 1224, 30 Cal. Rptr. 2d 629 (1994) (App. 1a). The decision of the Court of Appeal of California was reported as *Planned Parenthood Shasta-Diablo, Inc. v. Williams,* 18 Cal. App. 4th 359, 16 Cal. Rptr. 2d 540 (1993) (App. 47a). The decision of the court of appeal denying rehearing (App. 66a) and the decisions and orders of the Superior Court of Solano County, California (Apps. B, E, F) are unreported.

JURISDICTION

The Supreme Court of California entered its decision on May 26, 1994. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The first amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

The first section of the fourteenth amendment to the United States Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, withoue due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

In this case, a state trial court granted an injunction confining all of petitioners' "picketing, demonstrating, or counseling" to the sidewalk across a four-lane street from the respondent's facility. This restriction meant that petitioners could not demonstrate in front of an abortion facility but would instead have to demonstrate in front of a pro-life facility (Birthright) across the street. This restriction was also significantly broader than the mere numbers limitation requested by the plaintiff (respondent). The state appellate court upheld the restriction on the basis of the state constitutional right to privacy. The Supreme Court of California upheld the injunction as

narrowly tailored to serve the governmental interest in "protecting the patients' physical and emotional health and safety." App. 17a.

Petitioners are an individual and an unincorporated association motivated by their concern for women and children to speak out against abortion. Respondent Planned Parenthood Shasta-Diablo ("PP") is an abortion business which operates several facilities. This litigation arose out of the expressive activities of petitioners at one such location.

Beginning in March, 1990, petitioners would go to PP's facility at 990 Broadway, Vallejo, California, on Thursdays, when abortions were scheduled. Adjacent to this facility is a parking lot shared by PP and another business. Some people entered the parking lot for the purpose of offering information and counseling, both spoken and written, to women seeking abortions at PP's facility.[1]

In August, 1990, PP brought an action in the Superior Court of Solano County, California, seeking preliminary and permanent injunctive relief. In particular, PP sought an order barring petitioners from the parking lot and limiting the number of picketers on the public sidewalk to two. App. 30a. The trial court granted the order. App. 67a.

In September, 1990, the trial court held a hearing on the preliminary injunction, at which two witnesses testified, a PP employee and a pro-life counselor. App. 31a. The court issued a preliminary injunction which excluded the picketers from the parking lot and limited the number of picketers on the sidewalk to four. App. 70a.

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[1] Although both the trial court and the supreme court stated that "as many as 100 people" gathered at the facility, App. 5a (n.3), 45a, the testimony was that the usual number was about eight, and on *one* weekend day (when no abortions were scheduled, App. 2a), there were almost one hundred people on the sidewalk in front of the facility. *See* App. 32a.

In April, 1991, the trial on the permanent injunction was held in one afternoon, with only three witnesses testifying, two from Planned Parenthood and the third being petitioner Christine Williams. App. 32a, 44a. On August 1, 1991, the trial court issued a permanent injunction. App. 44a. The injunction prohibited the petitioners from, *inter alia*, "referring, in oral statements while at the picket site, to physicians, staff, or clients as 'murdering' or 'murderers,' 'killing' or 'killers;' or to children or babies being 'killed' or 'murdered' by anyone in the PLANNED PARENTHOOD building in the presence of children under the age of 12." App. 46a. The court also ordered that "All picketing, demonstrating, or counseling at the PLANNED PARENTHOOD building shall only take place along the public sidewalk across the street from the PLANNED PARENTHOOD building." *Id.*[2]

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[2] The similarity between the trial court's order and the injunction upheld in *Bering v. SHARE*, 106 Wash. 2d 212, 721 P.2d 918 (1986), *cert. dismissed*, 479 U.S. 1050 (1987), is worth noting. The provision concerning the use of particular words in the presence of children is identical to the one in *Bering*, 106 Wash. 2d at 219, 242, 721 P.2d at 924, 935-36. The place restrictions are also very much alike in that, rather than banning speech from a particular area, they dictate that all "picketing, demonstrating, and counseling" may take place only at a particular location, *id.* at 219, 221, 721 P.2d at 923, 924; *id.* at 260-61, 721 P.2d at 945 (Goodloe, J., dissenting).

This is noteworthy because, in both the content and place restrictions of the present injunction, the trial court exceeded what the plaintiff PP had requested, and consequently exceeded the scope of the evidence presented. PP had expressed concern over the picketers' own children running on the sidewalk, not about what they or other children might hear. *See* App. 63a. There was no evidence at all, at any stage of the proceedings, on the issue of the effect of the picketers' speech on children. Similarly, with the place restriction, the primary issues before the trial court were whether picketers should be barred from the parking lot and whether there should be any limitation on their *number* on the public sidewalk. The necessity or desirability of banning *all* pro-life speech activity from the sidewalk was simply never raised or addressed.

Petitioners appealed to the First Appellate District of the Court of Appeal of California, which overturned the restriction on the content of speech but affirmed the place restriction.[3] The court of appeal, using the "time, place, and manner" test applicable to restrictions on speech imposed by statutes and ordinances, App. 54a, held that the place restriction was *not* narrowly tailored to serve the state's interest in maintaining the free flow of pedestrian and vehicular traffic. App. 55a-56a. Nevertheless, in a convoluted holding which placed the petitioners in the role of state actors, App. 58a (n.5), the court stated, "[W]e are compelled by our *state* Constitution to strike down restrictions on a woman's right of procreative choice unless the restriction is narrowly tailored to serve a compelling governmental interest," App. 59a (emphasis in original). On that reasoning, the court "struck down" the petitioners' speech activities by upholding the place restriction. App. 60a.

Petitioners sought and obtained review in the Supreme Court of California. The state supreme court, with one justice dissenting, affirmed. App. 1a.

The supreme court did not disturb the court of appeal's conclusion that the ban was *not* narrowly tailored to protect pedestrian and vehicular traffic. App. 6a (n.4); App. 20a (n.10) ("the critical issue was not access"). Nor did supreme court endorse the court of appeal's rationale upholding the ban as necessary to protect a state constitutional right to abortion. App. 17a (n.9). Instead, the supreme court held that "a place restriction serves the substantial governmental interest in protecting the patients' physical and emotional health and safety." App. 17a. The ban on *all* speech on the sidewalk was narrowly tailored, according to the supreme

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[3] Petitioners also appealed (on state constitutional grounds) their exclusion from the parking lot and (on the lack of evidence) three other provisions. The court affirmed these provisions, App. 51a-53a, 60a (n.6), which are not at issue here.

court, because the "state's interest was to alleviate the hazardous medical environment created by the intimidating presence of protesters in close proximity to patients." App. 20a. Nothing short of a complete ban would "mitigate the *emotional* impact on women forced to navigate even a limited number of pickets and sidewalk 'counselors.'" *Id.* (emphasis added).

The supreme court concluded that the place restriction was content-neutral because it made "no reference whatsoever to the content of petitioners' speech," App. 8a, and that the place restriction left open ample alternatives because the "site across the street" allowed petitioners to be "within plain view of their target audience;" should anyone wish to speak to the petitioners, "it is a short walk across the street," App. 23a.

Justice Joyce Kennard dissented from the court's ruling on several grounds, beginning with its review of the record in the case: "Relying on fragmentary and equivocal testimony, the majority derives from the trial court a factual picture that is incomplete and misleading." App. 27a. While granting that some form of buffer zone may be justified to ensure ingress and egress to the facility, Justice Kennard concluded that the present injunction imposed an unconstitutional restriction on the petitioners' First Amendment rights. *Id.*

First, Justice Kennard stated that "the majority may violate the content neutrality requirement when it suggests that the zone may be justified as a means of preventing emotional or psychological distress to women seeking abortion or other pregnancy-related services," App. 36a. "This emotional distress may in large measure be attributable to the content of the anti-abortion message," she noted, in which case "the offered justification is impermissible, for restrictions on speech may not be based on how the message affects those who receive it." *Id.* (citations omitted).

Second, Justice Kennard observed that the alternative channels of communication were inadequate:

> Persons entering or leaving the clinic may not notice the protesters standing across the roadway, and unless they take the effort to cross that roadway, they will be unable to converse with the protesters in a normal tone of voice or to peruse or accept their offered literature. At this distance from persons entering and leaving the clinic, the only speech left to the protesters is that conveyed by placards and shouted slogans.

App. 37a.[4] Furthermore,

> there is a substantial risk that the protesters' message will be grossly misinterpreted by casual viewers. Because the protests must take place in front of the office of Birthright of Vallejo Benicia, those passing by, including pregnant women contemplating abortion, may assume the protest is directed against that organization, which opposes abortions, rather than against the medical clinic, which provides them.

Id.

Finally, Justice Kennard argued that the restriction was not narrowly tailored to serve a significant government interest. Justice Kennard cited to the trial record, which contained no testimony indicating that the restrictions imposed by the preliminary injunction—which did not impose a total ban on use of the sidewalk—were in any way inadequate to protect the health and safety of PP's patients. App. 38a. There was no evidence that passage was in fact obstructed during the life of the preliminary injunction. App. 43a. Likewise, there was no evidence that women entering PP's facility were subjected to the harassment and intimidation of "abusive forms of expres-

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[4] In fact, the only speech left is placards, as another provision of the permanent injunction prohibits petitioners from "shouting at . . . patients entering or leaving the Planned Parenthood building . . . ." App. 46a (¶ 5).

sion" while the preliminary injunction was in effect. App. 40a. Justice Kennard concluded, "The record utterly fails to provide the required justification" for a ban on all speech on the public sidewalk. App. 42a.

REASONS FOR GRANTING THE WRIT

The decision of the Supreme Court of California was issued before this Court's decision in *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994). Because the state supreme court's decision is in plain conflict with *Madsen*, this Court should either summarily reverse the decision below, or else grant review, and, if appropriate, remand for reconsideration in light of *Madsen*. *Accord Reali v. Feminist Women's Health Center*, 114 S. Ct. 2776 (1994) (summarily granting review, vacating decision below, and remanding for further consideration in light of *Madsen*).

The decision of the Supreme Court of California is nothing less than a rationale for excluding *all* pro-life speech from *all* public sidewalks or property adjacent to abortion businesses, or from any place where an abortion patron might have to pass a pro-life picketer or counselor. The supreme court justified the place restriction at issue by reference to the emotional effect of the petitioners' speech on women approaching the facility. Simply put, the supreme court held that pro-life speech can be restricted because of the emotional trauma it allegedly causes.

In describing the actions of the petitioner which justified the ban on their speech, the supreme court could not point to a single instance of a demonstrator physically threatening or blocking a patient. Instead, the court utilized loaded terms which give the impression that conduct was at issue, e.g., "confronting," "intimidating," "pursuing," "hounding," "forcing." App. 15a-16a, 20a. Yet, just as when used by the respondent PP, these terms are merely thin disguises for animosity toward the content of the speech.

This decision makes it amply clear that, in the state supreme court's view, as in respondent PP's view, there is no acceptable manner to picket or counsel outside an abortion facility. If Christine Williams approaches people, she is "accosting," "confronting," or "intimidating" them. If another counselor approaches with her, they are "surrounding" or "encircling" the people. If Mrs. Williams walks a few steps with women toward the facility, she is "harassing" or "hounding" them. If she walks a few steps away from the facility with women, she is "stalking," "following," or "pursuing" them. If she offers information with an outstretched arm, she is "thrusting" literature. If she urges people to take the literature and read it, she is "forcing" literature on them.[5]

The state supreme court's view of the acceptable limits of discourse in a public forum make a mockery of the First Amendment and its promise of debate on public issues which is "uninhibited, robust, and wide-open." Following the flawed reasoning of the Supreme Court of Washington in *Bering v. SHARE*, 106 Wash. 2d 212, 721 P.2d 918 (1986), *cert. dismissed*, 479 U.S. 1050 (1987), the Supreme Court of California has unabashedly taken sides in the abortion debate by holding that any attempt to present the pro-life viewpoint with conviction, to the relevant audience, automatically constitutes enjoinable "harassment," "intimidation," and "confrontation."

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[5] Furthermore, whenever the police are called by PP, the prolifers are presumed to be at fault. In criminal matters, if police are called, an arrest must be made, charges filed, a trial held, and, based on proof beyond a reasonable doubt, a conviction obtained before punishment is imposed. By contrast, based on the bare testimony that PP's director called the police about the picketers, the supreme court jumped to the conclusion that the picketers were at fault and the preliminary injunction was being violated. App. 4a (n.2).

I. THE DECISION OF THE SUPREME COURT OF CALIFORNIA CONFLICTS WITH THIS COURT'S PRIOR DECISIONS.

A. The Supreme Court of California Applied an Incorrect Standard for Reviewing Injunctive Restrictions on Speech.

The Supreme Court of California, in assessing the constitutionality of the injunctive ban on speech on the public sidewalk, applied "a familiar framework of analysis." App. 6a. That framework was the "time, place and manner" test this Court has employed to review statutes, ordinances and regulations restricting speech in public fora. App. 7a-8a. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *Frisby v. Schultz*, 487 U.S. 474, 480 (1988).

In *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994), however, this Court held that "our standard time, place, and manner analysis is not sufficiently rigorous" for review of injunctions. *Id.* at 2525. Instead, injunctive restrictions on expressive activity may "burden no more speech than necessary to serve a significant government interest." *Id.* This Court explained further, *id.* at 2526, that this test is equivalent to the test set forth in the earlier case of *Carroll v. President of Princess Anne*, 393 U.S. 175 (1968). In *Carroll*, this Court elaborated upon the governing constitutional standard as follows:

> An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of public order. . . . In other words, the order must be tailored as precisely as possible to the exact needs of the case.

Carroll, 393 U.S. at 183-84. *See Madsen*, 114 S. Ct. at 2526.

The decision of the Supreme Court of California, in erroneously applying a less stringent standard to the pres-

ent injunction, directly conflicts with this Court's rulings in *Madsen* and *Carroll*.

B. The Supreme Court of California Upheld a Restriction Which Burdens More Speech Than Necessary to Serve a Significant Government Interest.

Applying the correct standard—the *Madsen/Carroll* test—shows that the court below erred in upholding the present injunction.

1. *The injunction cannot be justified as necessary to prevent "emotional trauma."*

The Supreme Court of California held that the injunction was narrowly tailored to serve a significant state interest in "protecting the patients' physical and emotional health and safety." App. 17a. The court stated that "emotionally jarring confrontations with anti-abortion pickets or sidewalk 'counselors' may pose serious health risks." App. 14a. The court noted the trial court's finding that the petitioners' conduct "causes some of the women seeking counseling or services from [PP] to become emotionally distraught." App. 16a. "One of the principal purposes of the trial court's place restriction was thus to constrain petitioners' confrontational tactics and thereby limit the physical intimidation of, and resulting emotional trauma to, the clinic's patients." *Id.*

In *Madsen*, this Court considered a restriction on speech that was designed to protect patients and staff from being "stalked" or "shadowed" as they approached an abortion facility. 114 S. Ct. at 2529. Specifically, the challenged provision prohibited, within 300 feet of the facility, physically approaching any person seeking services "unless such person indicates a desire to communicate." *Id.*

This Court struck down the provision, holding that it burdened more speech than necessary to prevent intimidation and ensure access to the facility. "Absent evidence

that the protesters' speech is independently proscribable (i.e., 'fighting words' or threats), or is so infused with violence as to be indistinguishable from a threat of physical harm, . . . this provision cannot stand." *Id.* (citation omitted). "As a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment." *Id.* (internal quotation marks and citation omitted).

Though the geographical mechanics differ, the injunctive restriction upheld by the state supreme court in this case is equivalent to the 300-foot "no-approach zone" struck down by this Court. Both restrictions were intended to "prevent intimidation" of patients. *Id.* Both set out to achieve this goal by preventing demonstrators and counselors from approaching patients. *Id.* The state supreme court itself described the zone in the present case as "effectively insulating the clinic's patients and staff from close physical contact with petitioners," App. 10a.

The restriction upheld here goes even farther than the one struck down by this Court in *Madsen*, in that it prohibits approaches even if invited by the patient. The present injunction forces an interested patient to go out of her way to reach the counselors by crossing the street to speak with them or receive information.

Clearly, if a ban on *uninvited* approaches burdens more speech than necessary to prevent intimidation, *Madsen*, then a zone designed to prevent *all* approaches, whether invited or uninvited (which is the intent and effect of the zone here), burdens substantially more speech than necessary.

2. *The injunction cannot be justified as necessary to preserve access to the facility.*

The state supreme court noted that the court of appeal had held that the sidewalk ban was *not* narrowly tailored

to serve the governmental interest in keeping the street and sidewalk clear for vehicles and pedestrians. App. 6a (n.4). The supreme court did not disturb or question that holding; on the contrary, the court held that "merely keeping the sidewalks free for passage does not address the problem identified by the trial court of protesters hounding and upsetting unwilling listeners." App. 20a. Thus, "[*T*]*he critical issue here was not access*, but health and safety." App. 21a (n.10) (emphasis added).

The state supreme court's decision is thus in direct conflict with this Court's holding in *Madsen* that the "accepted purpose of the buffer zone is to protect access to the clinic and to facilitate the orderly flow of traffic on [the street]." 114 S. Ct. at 2528. In striking down portions of a 36-foot buffer zone, this Court stated, "Absent evidence that petitioners standing on the [property in question—here, the public sidewalk in front of PP] have obstructed access to the clinic, blocked vehicular traffic, or otherwise unlawfully interfered with the clinic's operation, this portion of the buffer zone fails to serve the significant government interests relied on by the [lower court]." *Id.* The "harassment"-free zone here fails to meet the standard articulated in *Madsen*.

In upholding the place restriction, the state supreme court repeatedly cited the alleged *emotional* impact on patients of the petitioners' speech activities. App. 11a-22a. As noted above, though the court used terms suggesting that the petitioners' conduct was at issue, a closer examination of the record reveals that the court used words such as "confrontational," "intimidating," and "harassing" quite liberally, with little substance to back them up.

There was no evidence, nor did the trial court find, that the petitioners ever touched (much less assaulted) anyone, shouted at or threatened anyone, or hurled any literature or plastic fetal models at anyone. App. 45a-46a. Instead, the state supreme court pointed to several examples of what it considered to be the real problem:

> The trial court found, *inter alia*, that petitioners' pickets and counselors "confront[ed]" and "intimidate[d]" women seeking the clinic's services; "force[d]" plastic fetuses and counseling on the clinic's staff and patients; and "pursued" patients to their cars or public transportation in an effort to distribute literature and plastic fetuses. There was testimony that petitioners continued to accost, follow or encircle patients even after they indicated a desire to be left alone: "If the [car] windows were being rolled up, they would attempt to pass literature through the window;" "[one] client was crying and her sister or friend . . . was asking the people to leave her alone;" "[another] was really trying to get away from them;" when one women refused to take a plastic fetus, they handed it to her small child; on one occasion staff members had to disperse a group of picketers who were surorunding a patient on the sidewalk; women who came to the clinic for services unrelated to abortion were also emotionally upset.

App. 15a-16a.[6]

Each of these instances of "confrontational" and "intimidating" behavior proves nothing more than that the petitioners attempted to speak to women and to hand them literature. Stripped of the inflammatory terminology and the prejudicial implications which the state supreme court was so eager to read into the testimony, there is nothing in this description that rises to the level of enjoinable conduct.

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[6] PP's efforts to prevent communication between its patients and the petitioners are assumed by the lower courts in this case to arise from sheer necessity and a disinterested wish to "protect" women. The supreme court states, for example, that escorts "had to" disperse a group of picketers, App. 16a; the court of appeal said that PP "was forced" to employ escorts, App. 48a. The courts below reveal not the slightest awareness that respondent PP clearly has other motives (financial and ideological) for wishing to discourage contact between petitioners and potential patrons.

II. THE DECISION BELOW MERITS SUMMARY REVERSAL OR VACATION.

Regardless of whether the decision of the court below was defensible at the time it issued, that decision cannot survive *Madsen*'s repudiation of its legal underpinnings. In light of *Madsen*, the injunctive ban on all use of the public sidewalk must be struck down, as discussed above. Hence, this Court should grant the petition for certiorari and summarily reverse the decision below in light of *Madsen*.

In the alternative, this Court should grant the petition, summarily vacate the decision below, and remand for further consideration in light of *Madsen*. This Court already did precisely that in another case arising from California in which the state courts approved a smaller injunctive "buffer zone" against pro-life activities. *See Reali v. Feminist Women's Health Center*, 114 S. Ct. 2776 (1994), *vacating Feminist Women's Health Center v. Blythe*, 17 Cal. App. 4th 1543, 22 Cal. Rptr. 2d 184 (1993).

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CONCLUSION

For the foregoing reasons, this Court should grant this petition and either summarily reverse the decision below or vacate that decision and remand for further consideration in light of *Madsen*. In the alternative, this Court should grant this petition and set the case for plenary review.

Respectfully submitted,

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Aug. 23, 1994

APPENDICES

APPENDIX A

[Filed May 26, 1994]

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

S031721

(Ct.App. 1/3 No. A055117
Solano County Super. Ct. No. 110090)

PLANNED PARENTHOOD SHASTA-DIABLO, INC.,
Plaintiff and Respondent,

v.

CHRISTINE WILLIAMS *et al.*,
Defendants and Appellants.

We are confronted in this matter with a collision between competing constitutional interests involving a subject of exceptional public concern. The precise question is whether, in granting and upholding a permanent injunction against anti-abortion protesters, the trial court and Court of Appeals properly balanced the free speech and assembly rights of the protesters, against the health and safety interests of women attempting to obtain medical services, including clinical abortions, in a private medical facility. We conclude that the injunction, as modified by the Court of Appeal, is constitutional and therefore shall affirm the judgment.

I. FACTS

Viewed independently to determine whether the evidence supports the judgment (*Bose Co.* v. *Consumers Union of U.S., Inc.* (1984) 466 U.S. 485, 498-511) the record discloses the following: [1]

Planned Parenthood is a nonprofit corporation operating a family planning clinic in Vallejo. The clinic provides a range of family planning, health and counseling services, including abortions. Located in a one-story building that it shares with another commercial tenant, a tax service, the clinic adjoins a parking lot located on one side and to the rear of the building. There is a concrete yard for additional parking immediately in the front, and a narrow public sidewalk between the yard and the street. The sidewalk is punctuated by two driveway entrances.

Solano Citizens For Life, under the direction of Christine Williams (hereafter petitioners), is an organization opposed to abortion. Beginning in March 1990, petitioners and others began gathering at the clinic, primarily on Thursdays when abortions were performed, to demonstrate against abortion. Although their numbers varied, there were usually six to eight demonstrators at any given time,

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[1] *Bose* held that in cases involving the constitutional rule of *New York Times* (*New York Times* v. *Sullivan* (1964) 376 U.S. 254) facts pertinent to the critical question of actual malice must be independently reviewed. (*Bose, supra,* 466 U.S. at pp. 505-514; see also *McCoy* v. *Hearst Corp.* (1986) 42 Cal.3d 835, 842.) It is unclear whether appellate courts have a duty to review de novo all facts relevant to the application of First Amendment principles in all cases involving time, place and manner restrictions. (See *Renton* v. *Playtime Theaters, Inc.* (1986) 475 U.S. 41, 53, fn. 3; *Don's Porta Signs, Inc. et al.* v. *City of Clearwater, Florida* (11th Cir. 1987) 829 F.2d 1051 (cert. denied (1988) 485 U.S. 981 (White, J. dissenting)).) We need not resolve this question, however, since we determine that, under any standard, the trial court's findings should not be disturbed.

and occasionally as many as one hundred. The protesters frequently brought their children as well, ranging in age from infants to teens.

Petitioners picketed on the sidewalk in front of the clinic as well as in the parking lot, carrying signs condemning abortion. One of the tactics of the sidewalk picketers was to walk slowly across the driveway entrance, thereby delaying cars attempting to turn into the lot. As the cars drove in, the protesters would approach and surround the car, attempting to pass literature through the windows even as they were being rolled up. Others pursued patients walking from their cars to the clinic entrance, as well as along the sidewalk and across the street to the bus stop, offering "sidewalk counseling." "Counseling" consisted of pressing anti-abortion literature and plastic replicas of fetuses on patients attempting to enter the clinic and exhorting them to reconsider their decision to have an abortion. Petitioners also stationed several "counselors" directly outside of the clinic entrance for the same purpose.

The anti-abortion protesters also targeted clinic staff, on at least one occasion calling a clinic nurse a "murderess" and admonishing her not to "kill" babies. They also photographed clinic staff and patients and recorded the license numbers of cars entering the lot.

Petitioners' activities created emotional distress and anxiety in the clinic's patients. As a result the clinic began to utilize volunteer escorts to accompany patients entering and leaving the building. In one instance the escorts dispersed a group of protesters encircling an emotionally distraught patient on the sidewalk.

II. PROCEDURAL HISTORY

In August 1990, Planned Parenthood filed the instant action for a temporary restraining order and preliminary and permanent injunction. The trial court issued a tem-

porary restraining order that enjoined petitioners from harassing any person entering or leaving the clinic and restricted their picketing to the sidewalk in front of the building. After a subsequent hearing, the trial court granted a preliminary injunction restricting to four the number of pickets that petitioners could maintain on the sidewalk in front of the clinic, and requiring that at least two of the pickets remain a minimum of ten feet from the other two.

Trial on the complaint for a permanent injunction was held in April 1991. Witnesses for both the clinic and petitioners described the protest activities at the clinic and their impact on patients and staff. There was also testimony that police enforcement of the terms of the preliminary injunction had been necessary.[2]

Following trial, the court made findings that petitioners had: (1) confronted and intimidated women seeking the clinic's services and forced plastic replicas of fetuses and

[2] The dissent's suggestion that there were no problems with enforcing the preliminary injunction is incorrect. One witness, Janice Schoenfeld, testified at the hearing on the permanent injunction that the demonstrators "followed the injunction usually, *except for picketers*." The picketers are precisely the sidewalk protesters at issue here, and they are clearly the ones who were apparently *not* obeying the preliminary injunction. Furthermore, Marsha Anderson, the clinic director, also testified that she had been compelled to "call[ ] the police to issue the injunction a couple of times, to hand it out to people who were on the sidewalk and were about to break the rules." The dissent suggests that Ms. Anderson was referring to the temporary restraining order. On the contrary, the context of her statement, and her reference to issuance of the "injunction," makes it reasonably clear that she is referring to the preliminary injunction. The distinction is practically irrelevant in any event. The preliminary injunction issued a mere one month after the temporary restraining order. It seems unlikely that the witness was referring exclusively to events occurring during that one month interval. Rather, she is clearly referring to events subsequent to the issuance of the temporary restraining order and preliminary injunction, but prior to the hearing on the permanent injunction.

"counseling" upon the clinic's staff and clients; (2) interfered with or obstructed entrance to and exit from the clinic; (3) pursued patients to their cars or public transportation to distribute literature and plastic fetuses; and (4) caused some of the women seeking counseling or services to become emotionally distraught.[3]

Based on these findings, the trial court granted a permanent injunction against petitioners, enjoining them from: (1) blocking any entrance or exit to the clinic building; (2) recording the license numbers of cars entering or leaving the clinic; (3) photographing any person entering or leaving the clinic building; (4) referring, in oral statements while at the clinic site, to physicians, staff or clients as "murdering" or "murderers," "killing" or "killers," or children or babies being "killed" or "murdered" by anyone in the clinic building in the presence of children under 12; and (5) shouting at or touching physicians, staff or patients entering or leaving the clinic or making noise that could be heard inside the premises. In addition, the injunction restricted all picketing, demonstrating or counseling to the public sidewalk across the street from the clinic building.

On appeal, petitioners challenged those provisions of the injunction that: (1) restricted the content of their speech by preventing them from using specific language in front of children while at the protest site; (2) excluded them from the clinic parking lot; and (3) excluding them from the public sidewalk in front of the clinic building. The Court of Appeal invalidated the content restriction on petitioners' speech, finding that it was not justified by

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[3] The court also found that petitioners had recorded the license plate numbers of clinic staff and patients and photographed them; that petitioners had called staff "murderers" and asked them not to "kill babies"; that the clinic had to escort its patients through picket lines and "picket/counselors" in the parking lot; and that petitioners had conducted these activities on a weekly basis with as many as 100 people involved.

any compelling interest apparent from the record. The Court of Appeal upheld the parking lot exclusion, however, ruling that the clinic was not the functional equivalent of a public forum under *Robins* v. *Pruneyard Shopping Center* (1979) 23 Cal.3d 899, and that petitioners were not, therefore, entitled to exercise their free speech rights on clinic property. The court also sustained the sidewalk restriction, concluding that it served a substantial governmental interest in safeguarding a woman's right to procreative choice under article I, section 1, of the California Constitution, and was narrowly tailored to serve that interest.[4]

Petitioners sought review solely on the issue of the sidewalk exclusion. We granted the petition to consider that aspect of the injunction.

III. DISCUSSION

We recognize at the outset the intense moral, religious and political concerns associated with the underlying subject matter of this lawsuit. We are constrained, however, to focus on the legal issue presented. The sole legal question, as noted, is whether the injunction provision which effectively bars petitioners from the public sidewalk in front of the clinic by requiring that all picketing, demonstrating or counseling take place on the public sidewalk directly across the street, violates petitioners' First Amendment rights. To answer this question we apply a familiar framework of analysis.

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[4] The Court of Appeal also held that the sidewalk restriction served a substantial governmental interest in keeping the public street and sidewalk unimpeded for the free flow of vehicle and pedestrian traffic (*Cameron* v. *Johnson* (1968) 390 U.S. 611, 622), but concluded that the restriction was not narrowly tailored to further that end.

A. *Regulation of Speech in a Public Forum*

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble . . . ." (U.S. Const., 1st Amend.) These rights are safeguarded against state interference by the due process clause of the Fourteenth Amendment. (*De Jonge* v. *Oregon* (1937) 299 U.S. 353, 364.) Furthermore, it is settled that when, as here, the judicial process is invoked to restrict expressive activities on public property, "state action" is implicated entitling the aggrieved party to the protection of the First and Fourteenth Amendments. (*A. F. of L.* v. *Swing* (1941) 312 U.S. 321, *Bakery Drivers Local 802* v. *Wohl* (1942) 315 U.S. 769; *Hudgens* v. *NLRB* (1976) 424 U.S. 507, 519-521; *Feminist Women's Health Center* v. *Blythe* (1993) 17 Cal.App.4th 1543, 1561; *Bering* v. *Share* (Wn. 1986) 721 P.2d 918, 925; *see also Shelley* v. *Kraemer* (1948) 334 U.S. 1, 17.)

It is equally undisputed that peaceful picketing and leafletting constitute expressive "speech" activities at the core of the First Amendment. (*United States* v. *Grace* (1983) 461 U.S. 171, 176-177; *Frisby* v. *Schultz* (1988) 487 U.S. 474, 479.). When these activities occur in "public forums" historically associated with free expression, such as public streets and sidewalks, the right of the state to limit the expressive conduct is sharply circumscribed. (*Perry Ed. Assn.* v. *Perry Local Educators' Assn.* (1983) 460 U.S. 37, 44-45; *Hague* v. *CIO* (1939) 307 U.S. 496, 515.)

Nevertheless, "the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." (*Heffron* v. *Int'l Soc'y For Krishna Consc.* (1981) 452 U.S. 640, 647.) "[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech,

that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.' " (*Ward* v. *Rock Against Racism* (1989) 491 U.S. 781, 791, quoting *Clark* v. *Community for Creative Non-Violence* (1984) 468 U.S. 288, 293.)

Here it is undisputed that the public sidewalk directly in front of the clinic from which petitioners are barred constitutes a public forum. Thus, we must determine whether the place restriction is content neutral, narrowly tailored to serve a significant governmental interest, and permits ample alternative channels of communication. (*Frisby* v. *Schultz, supra,* 487 U.S. at pp. 480-481; *Perry Ed. Assn.* v. *Perry Local Educators Assn., supra,* 460 U.S. at p. 45.)

B. *Content Neutral*

The United States Supreme Court has defined content neutral speech regulations as those that regulate "without reference to the content of the regulated speech." (*Va. Pharmacy Bd.* v. *Virginia Consumer Council* (1976) 425 U.S. 748, 771.) The injunction at issue here makes no reference whatsoever to the content of petitioners' speech; it merely provides that all picketing, demonstrating or counseling shall take place on the public sidewalk across the street from the clinic. No speech of any "particular content" is "singled out" for better or worse treatment by the government. (*Ibid.*) Thus, the place restriction is clearly content neutral.

Petitioners strenuously assert otherwise, noting that the injunction was impelled by their anti-abortion protests and applies only to such activities. Obviously the injunction at issue here is confined to petitioners, and properly so; they were the only ones found to have harassed clinic patients and staff. (See *Northeast Women's Center, Inc.* v. *McMonagle* (3rd Cir. 1991) 939 F.2d 57, 63 [restriction on anti-abortion protest activities within 500 feet

of a women's health clinic properly "applies only to [defendants], but that is because it is only those persons who the Center has proved have created and are continuing to create a threat of violence and intimidation"]; *Pro-Choice Network* v. *Project Rescue* (W.D.N.Y. 1992) 799 F.Supp. 1417, 1433 ["It is true that the injunction applies only to the defendants, but that is because it is only the defendants who have created a threat of harassment and intimidation."].) A restriction that enjoined all picketers in addition to petitioners would clearly have been overbroad. (See *Thornhill* v. *Alabama* (1940) 310 U.S. 88, 97-98; *Bering* v. *Share, supra,* 721 F.2d at pp. 925-926.)

Furthermore, as the United States Supreme Court has explained: "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on *some* speakers or messages but not *others.*" (*Ward* v. *Rock Against Racism, supra,* 491 U.S. at p. 791, italics added.) Thus, the vast majority of courts that have considered the issue have upheld time, place and manner restrictions on anti-abortion protesters against challenges that they improperly "single out" such demonstrators or their message. (See, e.g., *Feminist Women's Health Center* v. *Blythe, supra,* 17 Cal.App.4th at p. 1559 ["the locational restriction on defendants' activity was not based on the content of their speech but on the conduct involved, i.e., the obstruction of ingress and egress by physical blocking and harassment, and on the risk of harm to the clinic's patients"]; *Bering* v. *Share, supra,* 721 P.2d at p. 925 [injunctive restrictions on anti-abortion protestors "are not related to the content of [the] picketers' speech, but rather to the way in which they conducted themselves at the picket site"]; *Fargo Women's Health* v. *Lambs of Christ* (N.D. 1992) 488 N.W.2d 401, 408 ["When an injunction is based on a record of force, trespass and intimidation, the justification for the injunction is the method of communicating, not the motivating idea."]; *Northeast Women's Center, Inc.* v. *McMonagle, supra,* 939 F.2d at p. 63 ["The injunction at issue here

is content-neutral. . . . The challenged sections of the injunction make no mention whatsoever of abortion or any other substantive issue—they merely restrict the volume, location, timing, and violent or intimidating nature of [defendants'] expressive activity."]; *N.Y. State Nat. Organization For Women* v. *Terry* (2nd Cir. 1989) 886 F.2d 1339, 1363 ["The message—that abortion is wrong, immoral, and must be stopped—is not singled out for unfavorable treatment. The injunction is not a ban, nor is it a ban masquerading as a limitation."]; *Portland Fem. Women's H. Ctr.* v. *Advocates For Life* (9th Cir. 1988) 859 F.2d 681, 686 [Limitation on anti-abortion protests "is not a content-based restriction of expression. . . . Rather, it focuses exclusively on the location and manner of expression."]; *Pro-Choice Network* v. *Project Rescue, supra,* 799 F.Supp. at p. 1433 [Injunction limiting pro-life protest activities "is content-neutral. . . . It regulates when, where and how defendants may speak, but not what they may say."]; but cf. *Cheffer* v. *McGregor* (11th Cir. 1993) 6 F.3d 705, 710-711; *Thompson* v. *Jernigan* (E.D. Mich. 1991) 770 F.Supp. 1195, 1201.)

As noted earlier, the place restriction at issue here makes no reference to petitioners' particular viewpoint or even to the general subject matter of their demonstrations; it focuses exclusively on the *manner* and *location* of their expressive activities, effectively insulating the clinic's patients and staff from close physical contact with petitioners—*not* from the content of their speech. (See *Portland Fem. Women's H. Center* v. *Advocates for Life, supra,* 859 F.2d at p. 686.) Indeed, a similar injunction might just as readily apply to pro-choice demonstrations or to any other disruptive protest in close physical proximity to the clinic. Thus, we conclude that the injunction satisfies the threshold test of content neutrality.

For similar reasons, petitioners' claim that the injunction operates as an unconstitutional "prior restraint" on protected speech must fail. A prior restraint is a content-

based restriction on speech prior to its occurrence. (*Southeastern Promotions, Ltd.* v. *Conrad* (1975) 420 U.S. 546, 558-559; *Northeast Women's Center, Inc.* v. *McMonagle, supra,* 939 F.2d at p. 63; Tribe, American Constitutional Law (2d ed. 1988) § 12-34, p. 1040.)[5] Valid time, place and manner restrictions which do not functionally prohibit all means of communication are not prior restraints. (See, e.g., *Poulos* v. *New Hampshire* (1953) 345 U.S. 395, 408; *Cox* v. *New Hampshire* (1941) 312 U.S. 569, 574-576; cf. *Organization For A Better Austin* v. *Keefe* (1971) 402 U.S. 415, 418-419.)

B. *Significant State Interest*

The more difficult question is whether the interests served by the injunction are consonant with its scope. Is the place restriction narrowly tailored to advance significant governmental interests, and does it allow adequate alternative avenues of communication? On balance, we conclude that the place restriction serves a significant governmental interest in safeguarding the health and safety of the clinic's patients, and is narrowly tailored to further that interest. We also conclude that the restriction allows petitioners adequate alternative means of conveying their anti-abortion message.

The Supreme Court has recognized that the reasonableness of a time, place or manner restriction depends heavily upon "[t]he nature of a place, 'the pattern of its normal activities. . . .' The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." (*Grayned* v. *City of Rockford* (1972) 408 U.S. 104, 116.) The high court has applied this principle to uphold regulation of speech activities on public streets and side-

[5] The prior restraint doctrine has also been invoked to invalidate procedurally inadequate or overbroad permit requirements. (See, e.g., *National Socialint Party* v. *Skokie* (1977) 432 U.S. 43; *Staub* v. *City of Baxley* (1958) 355 U.S. 313.)

walks in front of schools (*ibid.*), courthouses (*Cox* v. *Louisiana* (1965) 379 U.S. 559) and private residences (*Frisby* v. *Schultz, supra*, 487 U.S. 474). In *Grayned*, the court upheld a limitation on noisy demonstrations near schools during classroom hours, observing that the city had a "compelling interest in having an undisrupted school session conducive to the students' learning . . . ." (408 U.S. at p. 119.) In *Cox*, the court sustained a restriction on picketing outside of courthouses, holding that the statute served a significant state interest in protecting "the fair and orderly working of the judicial process." (379 U.S. at p. 565.) And in *Frisby*, the high court upheld a ban on picketing in front of individual residences, ruling that the ordinance furthered a substantial state interest in assuring "residential privacy" and repose. (487 U.S. at p. 484.)[6]

The principle that sustains the regulation of disruptive expression outside of schools, courthouses and individual residences applies equally, in our view, to permit the regulation of conduct "incompatible" with the health and safety of patients in a medical facility. (*Grayned* v. *City of Rockford, supra*, 408 U.S. at p. 116.) Indeed, the United States Supreme Court has explicitly recognized that the government has a significant interest in protecting hospital patients from disturbance. (See *Beth Israel*

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[6] As *Frisby* also illustrates, the state's interest in safeguarding individual privacy is particularly strong in circumstances where the audience cannot readily avoid the message. Thus, the government may properly protect "captive" listeners from unwanted intrusions into the home (*Frisby* v. *Schultz, supra*, 487 U.S. 474), on city buses (*Lehman* v. *City of Shaker Heights* (1974) 418 U.S. 298), and wherever individuals cannot escape "bombardment of [their] sensibilities." (*Erznoznik* v. *City of Jacksonville* (1975) 422 U.S. 205, 211, quoting *Cohen* v. *California* (1971) 403 U.S. 15, 21.) As we discuss below (*post*, at pp. [22a-23a] [typed maj. opn. at pp. 22-23]), the Constitution does not guarantee petitioners the right to create, in effect, a captive audience by cordoning off an area of the sidewalk and allowing no one to pass who did not agree to listen to their message.

Hosp. v. *NLRB* (1978) 437 U.S. 483 [upholding restrictions on speech designed to shield patients from upsetting speech]; *NLRB* v. *Baptist Hospital, Inc.* (1979) 442 U.S. 773 [*semble*]; see also Note, *Too Close For Comfort: Protesting Outside Medical Facilities* (1988) 101 Harv. L. Rev. 1856, 1862-1866 [hereafter, Note].)[7]

This interest is particularly acute in the context of family planning clinics that perform the most intimate of medical services, including abortions. The constitutional right of privacy that guarantees a woman's freedom to choose an abortion (*Planned Parenthood of Southeastern Pennsylvania* v. *Casey* (1992) 505 U.S. —— [112 S.Ct. 2791]; *Committee to Defend Reproductive Rights* v. *Myers* (1981) 29 Cal.3d 252) defines an equally substantial governmental interest in assuring that they are performed in a safe and suitable environment.[8] As the high court has stated, the government "may properly assert *important interests in safeguarding health*" and "in maintaining medical standards" in the performance of abortions. (*Roe* v. *Wade* (1973) 410 U.S. 113, 154, italics added.) The state has a "legitimate interest in seeing to it that an abortion, like any other medical proce-

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[7] As stated in *Beth Israel Hosp.* v. *NLRB*, *supra*, 437 U.S. 483, "Hospitals, after all, are not factories or mines or assembly plants. They are hospitals, where human ailments are treated, where patients and relatives alike often are under emotional strain and worry, where pleasing and comforting patients . . . . are principal facets of the day's activity, and where the patient and his family need a restful, uncluttered, relaxing, and helpful atmosphere, rather than one remindful of the tensions of the marketplace in addition to the tensions of the sickbed." (*Id.* at p. 509 (conc. opn. of Blackmun, J.) and quoted in *NLRB* v. *Baptist Hospital, Inc.*, *supra*, 442 U.S. at pp. 783-784, fn. 12.)

[8] We have recently held, moreover, that the privacy rights set forth in article I, section 1 of the California Constitution are protectible not only against governmental intrusion, but against private invasions as well. (*Hill* v. *National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1.)

dure, is performed under circumstances that *insure maximum safety for the patient*." (*Id.* at p. 150, italics added.)

The state's responsibility for the health and safety of women seeking medical services, including abortions, extends beyond the operating room. Physical or emotional intimidation of patients outside the doctor's office may significantly affect their course of treatment once they are inside. As one commentator has observed, "Forced [physical] proximity combined with unwanted speech threatens not only patients' repose and autonomy but their health as well." (Note, *supra*, 101 Harv. L. Rev. at pp. 1864-1865, fns. omitted.)

Indeed, emotionally jarring confrontations with anti-abortion pickets or sidewalk "counselors" may pose serious health risks. As one federal district court found: "Women entering and leaving clinics have been verbally harassed; the effect of such harassment has been to increase the level of anxiety a woman feels and to exacerbate any emotional problems associated with the abortion decision and procedure which in turn may have an adverse effect on the medical procedure itself and on the patient's psychological well-being thereafter." (*American C. of Ob. & Gyn., Pa. S.* v. *Thornburgh* (E.D. Pa. 1985) 613 F.Supp. 656, 666, affd. on other grounds *sub nom. Thornburgh* v. *American Coll. of Obst. & Gyn.* (1986) 476 U.S. 747.) Another court found that women confronted and harassed by anti-abortion demonstrators before entering the clinic suffered "[i]ncreased stress and anxiety" which could "cause patients to . . . have elevated blood pressure . . . hyperventilate . . . require sedation . . . or require special counseling and attention before they are able to obtain health care." (*Pro-Choice Network* v. *Project Rescue*, *supra*, 799 F. Supp. at p. 1427.) Others have noted that patients required to reschedule appointments as a result of stress-induced emotional trauma could face additional risks and complications arising from the delay, e.g., the added risks of a second- rather than a first-trimester abortion. (*Ibid.*;

see also *Feminist Women's Health Center* v. *Blythe*, *supra*, 17 Cal.App.4th at pp. 1553, 1555; *Planned Parenthood* v. *Holy Angels Catholic Church* (N.D.Cal. 1991) 765 F.Supp. 617, 620.) Medical staff at family planning clinics have testified before Congress that the psychological stress resulting from aggressive anti-abortion demonstrations has complicated both the medical treatment itself and the patient's subsequent well-being. (Abortion Clinic Violence: Oversight Hearings Before the Subcom on Civil and Constitutional Rights of the House Com on the Judiciary, 99th Cong., 1st & 2d Sess., cited in *Note*, *supra*, 101 Harv. L. Rev. at pp. 1865-1866.)

In light of this evidence, a considerable number of courts have upheld time, place and manner restrictions designed to temper the confrontational tactics of anti-abortion demonstrators and thereby alleviate the emotional distress and resulting health risks experienced by women entering and leaving family planning clinics. (See, e.g., *Feminist Women's Health Center* v. *Blythe*, *supra*, 17 Cal. App.4th at pp. 1553, 1555; *Bering* v. *Share*, *supra*, 721 P.2d at p. 928; *Right To Life Advo.* v. *Aaron Women's Cl.* (Tex.Ct.App. 1987) 737 S.W.2d 564, 569; *Northeast Women's Center, Inc.* v. *McMonagle*, *supra*, 939 F.2d at p. 63; *Medlin* v. *Palmer* (5th Cir. 1989) 874 F.2d 1085, 1090; *Portland Fem. Women's H. Ctr.* v. *Advocates For Life*, *supra*, 859 F.2d at p. 686; *Pro-Choice Network* v. *Project Rescue*, *supra*, 799 F.Supp. at p. 1427; *Planned Parenthood Ass'n* v. *Holy Angels Catholic Church*, *supra*, 765 F.Supp. at p. 620; *American C. of Ob. & Gyn., Pa. S.* v. *Thornburgh*, *supra*, 613 F.Supp. at p. 666.)

The findings of fact adopted by the trial court here reveal that it was precisely the health and well-being of the clinic's patients that constituted the court's primary concern. The trial court found, inter alia, that petitioners' pickets and counselors had "confront[ed]" and "intimidate[d]" women seeking the clinic's services; "force[d]" plastic fetuses and "counseling" on the clinic's staff and

patients; and "pursued" patients to their cars or public transportation in an effort to distribute literature and plastic fetuses. There was testimony that petitioners continued to accost, follow or encircle patients even after they indicated a desire to be left alone: "If the [car] windows were being rolled up, they would attempt to pass literature through the window"; "[one] client was crying and her sister or friend . . . was asking the people to leave her alone"; "[another] was really trying to get away from them"; when one woman refused to take a plastic fetus, they handed it to her small child; on one occasion staff members had to disperse a group of picketers who were surrounding a patient on the sidewalk; women who came to the clinic for services unrelated to abortion were also emotionally upset. Based on this and other evidence the trial court found that petitioners, their pickets and counselors, "caused some of the women seeking counseling or services from [the clinic] to become emotionally distraught."

One of the principal purposes of the trial court's place restriction was thus to constrain petitioners' confrontational tactics and thereby limit the physical intimidation of, and resulting emotional trauma to, the clinic's patents. Added to the stress that normally accompanies any medical treatment, the strain of being pursued and harried by anti-abortion pickets and sidewalk "counselors," however well-meaning, could result in serious medical problems. As mentioned earlier, such emotional distress could lead to inaccurate blood pressure readings or incomplete medical histories, complicate patient counseling, delay treatment, increase health risks, and prolong recovery. (See *Bering* v. *Share*, *supra*, 721 P.2d at p. 928; *Portland Fem. Women's H. Ctr.* v. *Advocates For Life*, *supra*, 859 F.2d at p. 683; *Planned Parenthood Ass'n* v. *Holy Angels Catholic Church*, *supra*, 765 F.Supp. at p. 620; *O.B.G.Y.N. Assoc.* v. *Birthright of Brooklyn* (1978) 407 N.Y.S.2d 903, 905-906; Note, *supra*, 101 Harv. L. Rev. at pp. 1865-1866.)

We conclude, therefore, that the place restriction serves a substantial governmental interest in protecting the patients' physical and emotional health and safety.[9]

C. *Narrowly Tailored*

While the state has a substantial interest in safeguarding the health and safety of its citizens who seek medical services, it must do so by narrowly tailored means which do not "unnecessarily interfer[e] with First Amendment freedoms." (*Schaumburg* v. *Citizens For a Better Environ.* (1980) 444 U.S. 620, 637.) Accordingly, we must also determine whether the place restriction was narrowly tailored to effectuate the state's interest.

In resolving this question, we are mindful of the Supreme Court's admonition that a narrowly tailored remedy is not synonymous with the "least restrictive means" of achieving the desired end. As the high court has explained, "[R]estrictions on the time, place, or manner of protected speech are not invalid 'simply because there is some imaginable alternative that might be less burdensome on speech.'" (*Ward* v. *Rock Against Racism, supra,* 491 U.S at p. 797, quoting *United States* v. *Albertini* (1985) 472 U.S. 675, 689.) "Rather, the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" (*Id.* at p. 799, quoting *United States* v. *Albertini, supra,* 472 U.S. at p. 689.) "So long as the means chosen are not substantially broader than necessary to achieve the government's interest . . . the regulation will not be invalid simply because a court concludes that the govern-

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[9] In view of our conclusion that the place restriction serves a substantial governmental interest in preserving health and safety, we need not address the holding of the Court of Appeal that the restriction was necessary to safeguard the patients' right, under article I, section 1 of the California Constitution, to procreative choice.

ment's interest could be adequately served by some less-speech-restrictive alternative." (*Id.* at p. 800.)

In crafting the injunction, it is apparent that the trial court was guided by the paramount need to maintain an atmosphere around the clinic conducive to the health of its patients and its normal medical functions. As the Supreme Court has stated, "[t]he crucial question [in determining the reasonableness of a time, place or manner restriction] is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." (*Grayned* v. *City of Rockford, supra,* 408 U.S. at p. 116). The threatening and intimidating behavior of petitioners' pickets and "counselors" was plainly inappropriate in the context of a health care facility treating women who are already undergoing the stress normally associated with abortions and other obstetrical or gynecological treatment. Confining the demonstrations to an alternative site across the street from the clinic responded most effectively to this threat by preventing petitioners from crowding patients and invading their "personal space." (*Pro-Choice Network* v. *Project Rescue, supra,* 799 F.Supp. at p. 1434.)

Such "clear zones" have been sanctioned by the United States Supreme Court in a variety of demonstration contexts (see, e.g. *Boos* v. *Barry* (1988) 485 U.S. 312 [sustaining ordinance prohibiting picketing within 500 feet of a foreign embassy]; *Cox* v. *Louisiana, supra,* 379 U.S. 559 [upholding ban on picketing near courthouse]) and, more recently, have been widely employed by state and federal courts in the context of anti-abortion protests. (See, e.g., *Planned Parenthood Ass'n* v. *Holy Angels Catholic Church, supra,* 765 F.Supp. at pp. 626-627 [court imposed a "no-protest" zone within 25 feet of clinic entrance]; *Pro-Choice Network* v. *Project Rescue, supra,* 799 F.Supp. at pp. 1440-1441 [injunction established 15-foot "clear zone" around clinic entrances and people and vehicles seeking access thereto]; *Portland Fem. Women's*

H. Ctr. v. *Advocates For Life, supra,* 859 F.2d at p. 686 [court sustained 12-foot "free zone" around clinic entrance]; *Northeast Women's Center, Inc.* v. *McMonagle, supra,* 939 F.2d at pp. 63-64 [court upholds injunction prohibiting all but six pickets within five hundred feet of clinic]; *Fargo Women's Health* v. *Lambs of Christ, supra,* 488 N.W.2d at pp. 407-408 [court sustains injunction prohibiting more than two protesters within one-hundred foot "bubble zone" around clinic]; see also Note, *supra,* 101 Harv. L. Rev. at pp. 1872-1874 [concluding that a "bubble zone" ordinance establishing a 100-foot buffer-zone around licensed medical facilities represented "the least restrictive means for serving the government's interest."].)

The nature and extent of the injunctions in these cases differ, naturally, depending upon the particular facts and geographic circumstances presented. They all embrace, however, the principle that a "clear zone" or "free zone" around a health clinic that does not foreclose alternative, albeit less confrontational means of communication present a narrowly tailored scheme for furthering the state's substantial interest in assuring the health and safety of women seeking abortions or other treatment. Nowhere is this principle more clearly stated than the widely cited decision in *Bering* v. *Share, supra,* 721 P.2d 918. There, the Washington Supreme Court upheld a geographical restriction strikingly similar to the one at issue here. Concerned that the confrontational nature of anti-abortion pickets and sidewalk "counselors" had created a "substantial risk" of harm to clinic patients, the trial court confined the protesters to the public sidewalk directly to the north and around the corner from the clinic entrance. (*Id.* at p. 925.) The Washington Supreme Court sustained the injunction, observing that a clear zone "away from the building's entrance and the sidewalk fronting the building" was necessary "to mitigate the severe emotional impact otherwise experienced by many patients, especially women who are visiting the Medical Building for abortion-

related services." (Id. at p. 929.) The place restriction was justified, the court concluded, to relieve the clinic's patients from the trauma of navigating "a gauntlet of placard-carrying" protesters and was narrowly drawn to accomplish that interest. (*Id.* at p. 930; see also *Thompson* v. *Police Dept. of City of New York* (1989) 546 N.Y.S.2d 945 [police may properly erect barricade preventing anti-abortion "counselors" from moving along the public sidewalk in front of women's health clinic and speaking directly to patients]; *People* v. *Maher* (1987) 520 N.Y.S.2d 309 [*semble*].)

Thus, in the light of the record and consistent with case law across the country, we conclude that the place restriction was narrowly tailored to effectuate a substantial state interest.

Petitioners and the various amici curiae in support thereof contend, nevertheless, that the injunction was not narrowly tailored to the circumstances because patients were not physically harmed, because the restriction exceeds that necessary to secure access to the clinic, and because less restrictive means, such as a narrower zone or a limit on the number of protesters, were available to ensure patient safety. The absence of physical assaults, however, is not dispositive. The state's interest was to alleviate the hazardous medical environment created by the intimidating presence of protesters in close proximity to patients. Similarly, merely keeping the sidewalks free for passage does not address the problem identified by the trial court of protesters hounding and upsetting unwilling listeners. Nor would restricting the number of pickets and counselors in front of the clinic necessarily mitigate the emotional impact on women forced to navigate even a limited number of pickets and sidewalk "counselors." [10]

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[10] At oral argument it was noted that the practice of limiting the number of pickets is often utilized in the context of labor disputes. Counsel for petitioners rejected this expedient as unduly violative of petitioners' First Amendment rights. We consider

And while it is always possible that the trial court might have devised a geographical restriction a few feet closer to the clinic than the sidewalk across the street, that is not the litmust test of constitutional validity. As noted earlier, so long as "the means chosen are not substantially broader than necessary to achieve the government's interest, . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." (*Ward* v. *Rock Against Racism, supra,* 491 U.S. at p. 800.) Our mandate, in short, does not encompass "quibbling over a few feet." (*Portland Fem. Women's H. Ctr.* v. *Advocates For Life, supra,* 859 F.2d at p. 686.) Although plainly not petitioners' ideal vantage point, the location across the street offers a reasonably precise and narrowly tailored means of accomplishing the state's interest.

The several cases on which petitioners rely do not suggest otherwise. In *Mississippi Women's Medical Clinic* v. *McMillan* (5th Cir. 1989) 866 F.2d 788, a women's

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the instant case to be distinguishable in any event. In the typical labor dispute, the governmental interest centers on maintaining free passage in public areas or guaranteeing access to the target premises; generally, these goals may be effectively attained by limiting the number of pickets. Here, in contrast, the critical issue was not access, but health and safety. In these unique circumstances, the trial court was eminently justified in concluding that the protestors' proven confrontational tactics posed an intolerable threat to the emotional health and safety of the patients, whether those tactics were resorted to by two or twenty. That the trial court had limited the number of protestors on the sidewalk in its preliminary injunction does not in any way undermine its subsequent judgment. A preliminary injunction is not a determination of the ultimate rights in controversy, but simply a provisional remedy pending a trial on the merits. (*Continental Baking Co.* v. *Katz* (1968) 67 Cal.2d 512, 528; *Socialist Workers etc. Committee* v. *Brown* (1975) 53 Cal.App.3d 879, 887-888.) Substantial evidence from the hearing on the permanent injunction established that the state's interest in protecting the patients required the preclusion of face-to-face, physical confrontations with the protesters.

health clinic applied for a preliminary injunction to restrain anti-abortion protesters solely on the ground that their patients' right to *choose* an abortion had been made more difficult by the protests. The federal district court denied the injunction and the court of appeals affirmed, noting the absence of any evidence that patients had been physically restrained or intimidated from entering the clinic and exercising their constitutional right to an abortion. (*Id.* at pp. 795-796.) The interest which we find to be pertinent here is not a woman's right to *choose* an abortion, but rather her right to have an abortion and other medical and family planning services in a safe and suitable environment.

Nor do *Planned Parenthood* v. *Wilson* (1991) 234 Cal. App.3d 1662 and *Allred* v. *Shawley* (1991) 232 Cal. App. 3d 1489, undermine our conclusion. These decisions deal exclusively with the propriety of an injunction barring anti-abortion protesters from private property. In each case, the Court of Appeal rejected the protesters' claim that a family planning clinic was the functional equivalent of a public forum, thus distinguishing our decision in *Robins* v. *Pruneyard Shopping Center*, *supra*, 23 Cal.3d 899. (*Planned Parenthood* v. *Wilson*, *supra*, 234 Cal.App. 3d at pp. 1671-1672; *Allred* v. *Shawley*, *supra*, 232 Cal. App.3d at pp. 1495-1505.) That issue, as noted earlier, is not presented here. Nor, finally, does *Chico Feminist Women's Health Center* v. *Scully* (1989) 208 Cal.App. 3d 230, support petitioners' cause. There the clinic moved for an injunction to exclude anti-abortion pickets from "any vantage," including streets and sidewalks, from which patients "can be identified." (*Id.* at p. 235.) The Court of Appeal ruled that the patients' privacy interest did not encompass a concomitant right to anonymity such as would justify the broad injunction sought. (*Id.* at pp. 240-243.) Here, however, the threat is not mere recognition, but emotional and physical health. The two cases are plainly distinguishable.

D. *Adequate Alternatives*

Lastly, petitioners contend that the place restriction denies them adequate alternative avenues of communication. They do not contend, however, that their picket signs cannot be seen, or that their presence and views cannot readily be perceived by clinic staff and patients. Rather, their principal complaint is that they will not be able physically to confront or "counsel" unwilling listeners because patients and staff will not be compelled to pass close to the demonstrators to enter the clinic. The objection is unavailing.

The First Amendment does not give petitioners the right to a captive audience, but simply "the opportunity to win the attention of passersby and engage them in conversation if the latter so desire." (*Bering* v. *Share, supra,* 721 P.2d at p. 930; see *Heffron* v. *Int'l Soc'y For Krishna Consc., supra,* 452 U.S. at p. 655 ["The First Amendment protects the right of every citizen to 'reach the minds of willing listeners and to do so there must be opportunity to win their attention.' "].) As the United States Supreme Court has stated, "A group of demonstrators could not insist upon the right to cordon off a street or entrance to a public or private building and allow no one to pass who did not agree to listen to their exhortations." (*Cox* v. *Louisiana* (1965) 379 U.S. 536, 555)

The alternative site across the street from the clinic affords petitioners a vantage from which to picket and demonstrate that is reasonably close to the clinic and, judging from the photographic exhibits in the record, within plain view of their target audience, the clinic patients and staff. As noted above, petitioners do not contend that their signs cannot be seen or that their presence and views cannot readily be perceived by persons entering and leaving the clinic. Should anyone wish to be "counseled" by or otherwise converse with petitioners, it is a short walk across the street. (See *Bering* v. *Share, supra,* 721 P.2d at p. 931.) Accordingly, we conclude that the injunction leaves petitioners ample alternative avenues of communication.

CONCLUSION

We are charged in this matter with resolving a conflict arising from perhaps the most difficult and divisive subject of our day. Our resolution of this clash of interest is bound to satisfy neither party completely. Any limitation on petitioners' speech activities less comprehensive than a total exclusion from the area will assuredly result in some distress to patients and disruption of the clinic's normal operations. Yet any restriction on those activities, of any scope or nature, will undoubtedly be perceived by petitioners as inconsistent with their sense of moral duty.

With that understanding, we have cautiously reviewed the litigants' claims of encroachment on their respective rights and interest. As the end of the law is peace, we have sought a resolution that confers neither undue advantage nor unfair hardship on either adversary. Indeed, our object has been to narrow as much as possible the accretion of power to one at the expense of the other.

Our review of the evidence and legal precedents confirm that the restriction fashioned by the trial court was consistent with these ends. In affirming that judgment, we endorse a result that is manifestly reasonable and conducive to the fostering of greater harmony in the community.

Accordingly, the judgment of the Court of Appeal is affirmed.

ARABIAN, J.

WE CONCUR:

LUCAS, C.J.
MOSK, J.
BAXTER, J.
GEORGE, J.
STRANKMAN, J.*

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* Hon. Gary E. Strankman, Presiding Justice, Court of Appeal, First Appellate District, Division One, assigned by the Acting Chairperson of the Judicial Council.

CONCURRING OPINION BY BAXTER, J.

Today's decision will probably receive a fair amount of publicity. Groups on either side of the abortion debate may hail it as a political victory or defeat. In legal circles, it will be cited as support for erecting "buffer zones" around family planning clinics besieged by protesters. (See *Operation Rescue* v. *Women's Health Center* (Fla. 1993) 626 So.2d 664, cert. granted Jan. 21, 1994, *sub. nom. Madsen* v. *Women's Health Center, Inc.* —— U.S. —— [127 L.Ed.2d 98] (Dock. No. 93-880).)

But abortion is not the central issue in this case. The free-speech problems presented could arise in any context. At issue is the extent to which the First Amendment's protection of political expression is limited by the rights of private citizens to conduct their lawful business without pain or hindrance.

In our society, all presumptions are in favor of unfettered expression, particularly where the forum is public and an issue of broad concern is involved. The First Amendment protects vigorous, even stinging, debate. The burden generally falls on the recipients of an unwanted message to turn away. (See *Frisby* v. *Schultz* (1988) 487 U.S. 474, 479-481; *Boos* v. *Barry* (1988) 485 U.S. 312, 318; *Erznoznik* v. *City of Jacksonville* (1975) 422 U.S. 205, 208-211; *Cohen* v. *California* (1971) 403 U.S. 15, 21-26.)

The question remains, however, whether the same protection applies where the speaker seeks to engage in face-to-face confrontations with individual members of a targeted audience, and where the risk of intimidation, humiliation, or violence is high. What if such tactics are calculated to coerce unwilling targets into a particular course of conduct whether or not they are persuaded by the message the speaker seeks to convey? These issues assume special significance in a media-savvy age, where news coverage may serve as an additional incentive for staging a violent protest.

Such tactics do not necessarily fall within the aegis of the First Amendment. Disruptive conduct need not be tolerated simply because it has a symbolic component or facilitates speech. (*United States* v. *O'Brien* (1968) 391 U.S. 367, 376.) No individual is expected to endure "fighting words" and vicious personal attacks (*Cantwell* v. *Connecticut* (1940) 310 U.S. 296, 309-310), or to experience hardship or a significant loss of privacy as a result of another's "free" speech. (*Frisby* v. *Schultz, supra,* 487 U.S. 474, 484-487; *Lehman* v. *City of Shaker Heights* (1974) 418 U.S. 298, 302-304 (plur. opn. by Blackmun, J.), 306-308 (conc. opn. of Douglas, J.).)

Like the parties and lower courts, the majority applies the rigorous test for evaluating time, place, and manner restrictions on speech in a "public forum." Such an approach assumes that all protest activities leading up to and affected by the trial court's injunction constitute "protected speech" under the First Amendment. (*Frisby* v. *Schultz, supra,* 487 U.S. 474, 479.) I agree that the injunction is entirely sustainable under this test, but I am not certain such solicitude is warranted. In my view, some of the more confrontational activities prompting the "buffer zone" injunction crossed the line from protected expression to unprotected interference with the lawful activities of other citizens. For that additional reason, I conclude the "buffer zone" imposed by the trial court was proper.

BAXTER, J.

I CONCUR:

George, J.

DISSENTING OPINION BY KENNARD, J.

I respectfully dissent.

The federal Constitution protects both a woman's right to obtain an abortion during the early months of pregnancy and the right of every person to publicly and peacefully express an opinion on emotionally charged and controversial issues like abortion. When presented with a case like this one, in which these constitutional rights appear to collide, a court must take special care to ensure that both rights are effectively protected, so far as reasonably possible.

In this case, a medical clinic that was the subject of anti-abortion demonstrations asked a court for an injunction to protect itself and its clients. The trial court issued preliminary orders permitting only a small number of protesters on the sidewalk in front of the clinic. Eleven months later, it issued a permanent injunction prohibiting *any* protesters on that sidewalk, even though the clinic had not sought such a blanket prohibition. We granted review solely to consider the validity of the sidewalk exclusion. The majority concludes that the exclusion was proper. I cannot agree.

My disagreement is not with the majority's descriptions of the pertinent law or the relevant interests at stake. Rather, I disagree with the majority's account of the operative facts and the conclusion it reaches by applying the law to those facts. Relying on fragmentary and equivocal testimony, the majority derives from the trial court record a factual picture that is incomplete and misleading. As I will explain, the record supports the trial court's decision to establish a buffer zone around the clinic, but not its absolute prohibition of speech within that zone.

I. STANDARD OF REVIEW

When it reviews an order restricting First Amendment rights, an appellate court must " 'make an independent examination of the whole record' to make sure that 'the

judgment does not constitute a forbidden intrusion on the field of free expression.' " (*Bose Corp.* v. *Consumers Union of U.S., Inc.* (1984) 466 U.S. 485, 499, quoting *New York Times Co.* v. *Sullivan* (1964) 376 U.S. 254, 284-286; see also *In re Capital Cities/ABC Inc.'s to Sealed Transc.* (3d Cir. 1990) 913 F.2d 89, 92 [when considering claimed First Amendment violations, reviewing courts "exercise substantially broader review" including "independent consideration of the [trial] court's order and the factual findings inferred from the evidence before it"]; *United States* v. *Smith* (3d Cir. 1986) 787 F.2d 111, 113, fn. 1 [recognizing reviewing courts' "special obligation" to independently examine the record in "the First Amendment context"].) The United States Supreme Court has explained the rationale for this heightened standard of review, in these words: " '[I]t is of prime importance that no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings of fact screening reality.' " (*NAACP* v. *Claiborne Hardware Co.* (1982) 458 U.S. 886, 924, quoting *Drivers Union* v. *Meadowmoor Co.* (1941) 312 U.S. 287, 293.) I fear this is precisely what has happened in this court with this case.

The majority pays lip service to the independent judgment standard of review, but it does not give the trial evidence the careful scrutiny that the standard requires.

II. FACTS AND PROCEEDINGS

The following are the relevant facts disclosed by application of the independent judgment standard of review to the record before this court. I begin with a description of the physical characteristics of the protest site, followed by a summary of pertinent trial court proceedings and the evidence presented in support of the permanent injunction at issue.

A. Physical Characteristics of the Protest Site

The site of the demonstrations at issue in this case is a public sidewalk in front of a building on Broadway in the City of Vallejo. Inside the building is a medical clinic operated by Planned Parenthood. The record discloses that the clinic is set well back from the street and sidewalk, with its entrances at or near the back of the building.

More precisely, the record shows that the clinic occupies the back of a one-story building, with a tax service business occupying the front. The staff entrance to the clinic is in the back of the building; its public entrance is on the side of the building near the back corner. The lot on which the building is situated is approximately 100 feet wide and 184 feet deep, the building itself is 36 feet wide and 64 feet deep.

In front of the building, between the tax service and the public sidewalk, is a parking area that extends around one side and to the back of the building. The distance between building and sidewalk is 44 feet. Two driveways intersect the sidewalk, providing clients and staff of the tax service and clinic with access to Broadway, a busy four-lane avenue. Across Broadway from the tax service and the clinic is an office occupied by Birthright of Vallejo/Benicia, an organization that opposes abortion.

B. The Complaint and The Temporary Restraining Order

This case began on August 8, 1990, when Planned Parenthood filed its verified complaint for injunctive relief. The complaint named as defendants Citizens for Life and Christine Williams, its director.

The complaint alleged that defendants, beginning in March 1990, had intimidated and harassed workers and clients of Planned Parenthood by verbally assaulting people entering and leaving the parking lot, by physically obstructing the driveway, and by forcing or attempting to

force anti-abortion literature on people and vehicles at or near the clinic. The complaint further alleged that defendants had "disrupted and attempted to disrupt" business at the clinic through non-amplified noise and by gaining or attempting to gain entrance to the parking lot, grounds, walkways, and offices.

In the complaint, Planned Parenthood asked the court to enjoin defendants from: (1) trespassing on clinic property; (2) blocking the driveway; (3) harassing or threatening any person entering or leaving the clinic; (4) shouting words "likely to disturb the peace" of Planned Parenthood, its staff, or its clients; (5) bringing children to the picket line; (6) shouting or using amplification devices to disturb Planned Parenthood's business; and (7) otherwise attempting to intimidate and harass Planned Parenthood's staff and clinics.

The complaint also specifically asked the trial court to restrict the number of picketers "to two on the public sidewalk." Planned Parenthood supported this request with two declarations, one by its attorney and the other by Janine Schoenfeld, Planned Parenthood's "escort coordinator." In her declaration, Schoenfeld described the anti-abortion protest activities of members and supporters of Citizens for Life. She then set forth the scope and justification for the proposed limit on the number of picketers, in these words: "One picket could stand on one of the sidewalks, and one on the other side of the driveway in safety in order to get their message across. All people going into the clinic would have to pass their signs. Their viewpoint would be clear to passers-by on Broadway."

On the same day (August 8, 1990), the trial court issued a temporary restraining order (hereafter TRO) that, among other things,[1] allowed no more than two protesters

[1] The TRO also prohibited the protesters from blocking the entrances to the parking lot, verbally harassing or making noises likely to disturb the peace of the clients and staff of the clinic,

on the sidewalk directly in front of the clinic. The TRO remained in effect until the trial court dissolved it on August 28, 1990.

C. The Hearing and The Preliminary Injunction

On September 12, 1990, the court held a hearing on Planned Parenthood's motion for a preliminary injunction. The witnesses at the hearing were Janine Schoenfeld (the Planned Parenthood employee whose declaration had been submitted with the complaint) and Jeanette Hammer, an anti-abortion protester.

Schoenfeld testified that her job at the clinic included escorting women into the clinic from the parking lot on days that the clinic provided abortion services. Of particular relevance for our purposes, she testified that the protests organized by defendants began in March 1990, that she had never asked the police to arrest any protester, that she had never made a citizen's arrest of any of the protesters, and that the police had come to the site once and had then admonished the protesters to stay on the sidewalk and to leave alone any person who so requested.

Hammer testified that she had picketed the clinic and had volunteered her services as a counselor to women approaching or leaving the clinic. She also testified that she had undergone an abortion herself and that this experience had led her to the view that pregnant women need information to help them make the important decision of whether or not to have an abortion.

One week after the hearing, on September 19, 1990, the court issued a preliminary injunction. In relevant part, the preliminary injunction "[r]estrict[ed] picketing and/or counseling to the public sidewalk in front of the

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bringing children to the property, recording license numbers, or photographing persons coming to and from the building. These aspects of the TRO, and similar provisions in the preliminary and permanent injunctions, are not at issue here.

building" but nonetheless provided that defendants could "maintain four (4) pickets and not more than two (2) shall be less than ten feet from any other picketer or counselor." The preliminary injunction remained in force until August 1, 1991, when the trial court issued the permanent injunction.

D. The Trial and The Permanent Injunction

Planned Parenthood's application for a permanent injunction was tried to the court on April 18, 1991. On that date, the preliminary injunction had already been in force for seven months. The trial lasted less than four hours and included the testimony of just three witnesses, all called by Planned Parenthood.

One of the witnesses was Janine Schoenfeld, the Planned Parenthood employee who had previously testified in support of the preliminary injunction. At the trial, she testified as follows: Before the issuance of the injunction, there had been eight picketers outside the clinic or in the clinic's parking lot, and on one weekend day there had been nearly one hundred protesters on the sidewalk in front of the clinic. In August of 1990, a police officer had told her that a representative of defendant Citizens for Life had contacted the police to find out "the rules regarding picketing at the clinic." With respect to events occurring after issuance of the preliminary injunction, the record shows the following exchange:

"Q. [by counsel for Planned Parenthood] Have you observed picket activity since the injunction?

"A. [by Schoenfeld] Yes, but they followed the injunction usually, except for picketers.

"[Counsel for Planned Parenthood]: Thank you. I have nothing further. Thank you.

"THE COURT: You say that they followed the injunction?

"THE WITNESS: They followed the injunction, yes since the injunction."

Schoenfeld was never asked to explain her cryptic remark that the protesters had obeyed the injunction "except for the picketers." The only elucidation was provided by the trial court's follow-up question, in which Schoenfeld reaffirmed that "they" had "followed the injunction." To the extent this equivocal remark might be construed as evidence that "picketers" had not "followed the injunction" (the majority does so construe it), it is the legal conclusion of a lay witness, unsupported by specific facts, and thus not competent evidence. (See Evid. Code, § 800; *People* v. *De Santis* (1992) 2 Cal.4th 1198, 1226; *Lombardo* v. *Santa Monica Young Men's Christian Assn.* (1985) 169 Cal.App.3d 529, 540; *Pond* v. *Insurance Co. of North America* (1984) 151 Cal.App. 3d 280, 289.)

Another trial witness was Marsha Anderson, the clinic's director. As one point in her testimony, she stated: "I called the police to issue the injunction a couple of times, to hand it out to people who were on the sidewalk and were about to break the rules, or breaking the rules." Because the majority relies upon this statement as evidence that "police enforcement of the terms of the preliminary injunction had been necessary" (maj. opn., *ante*, at p. [4a] [typed maj. opn. at p. 4]), this statement deserves careful examination.

In her testimony, Anderson never explained what specific acts by the protesters led her to conclude that they were "about to break the rules, or breaking the rules." Thus her testimony suffers from the same defect as the testimony of Schoenfeld: it is the legal conclusion of a lay witness, unsupported by specific facts, and thus it is not competent evidence. (Evid. Code, § 800.) Apparently seeking to avoid this difficulty, the majority infers that these "rule" violations consisted of specific acts, such as writing down license plate numbers and handing literature through car windows in the parking lot, that Anderson had described earlier in her testimony. But the record

will not permit this inference. Rather, the record shows that plaintiff's counsel asked Anderson to describe incidents "that occurred during the period of picketing *before the injunction*" (italics added), and the record shows that Anderson's descriptions of specific acts were in answer to this question. Anderson never stated that the protesters engaged in the same or similar conduct *after* issuance of the preliminary injunction, nor is there any evidence in the record to support a reasonable inference that such conduct occurred.

The third trial witness was defendant Christine Williams, the director of Citizens for Life. She testified that Planned Parenthood had called the police in August of 1990, but that since the injunction the picketing had been lawful.

On August 1, 1991—four months after the trial and eleven months after issuance of the preliminary injunction—the trial court issued a permanent injunction ordering that "[a]ll picketing, demonstrating or counseling at the PLANNED PARENTHOOD building shall only take place along the public sidewalk across the street from the PLANNED PARENTHOOD building."

III. FIRST AMENDMENT ANALYSIS

The First Amendment prohibits all government action abridging freedom of speech and assembly. (U.S. Const., 1st Amend.) The United States Supreme Court has described this constitutional guarantee, and its role in our political system, this way: "The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the

premise of individual dignity and choice upon which our political system rests." (*Cohen* v. *California* (1971) 403 U.S. 15, 24.)

Because this case concerns an injunction that prohibits picketing and distributing literature on a public sidewalk, there can be no doubt that the First Amendment is implicated. Picketing and leafleting are expressive activities at the core of the First Amendment. (See, e.g., *Boos* v. *Barry* (1988) 485 U.S. 312, 318; *United States* v. *Grace* (1983) 461 U.S. 171, 176-177.) And a public sidewalk is a quintessential public forum, a place traditionally used for exchanging ideas and expressing opinions. (*Frisby* v. *Schultz* (1988) 487 U.S. 474, 480; *Cornelius* v. *NAACP Legal Defense & Ed. Fund* (1985) 473 U.S. 788, 802; *Clark* v. *Burleigh* (1992) 4 Cal.4th 474, 482.)

Yet, even in a public forum, the government may impose reasonable restrictions on the time, place, and manner of speech. To be reasonable, however, the restrictions must (1) be content neutral, (2) be narrowly tailored to serve a significant governmental interest, and (3) leave open ample alternative channels for communication. (*Ward* v. *Rock Against Racism* (1989) 491 U.S. 781, 791.)

A. Content Neutrality

The permanent injunction's establishment of a protective buffer zone on the sidewalk in front of the clinic is, on its face, neutral as to content. It prohibits all speech in the buffer zone, not just speech carrying a certain message. But to satisfy the constitutional requirement of content neutrality, it is not enough that the restriction itself is neutral as to content. The justification for the restriction must take no account of the content of the restricted speech. (*Ward* v. *Rock Against Racism*, *supra*, 491 U.S. 781, 791 ["Government regulation of expressive activity is content neutral so long as it is '*justified* without reference to the content of the regulated speech.' "].)

Insofar as the justification for the buffer zone is ensuring ingress and egress to the clinic, it is content neutral. Regardless of their message, protesters may be enjoined from blocking driveways or otherwise physically obstructing the passage of automobiles and pedestrians going to or coming from the clinic. Also content neutral is the justification that excessive noise levels from sidewalk protesters could compromise the medical treatment and welfare of patients within the clinic. No matter what the message sought to be conveyed, excessively noisy speech can be enjoined when it interferes with sound medical practice.

But the majority may violate the content neutrality requirement when it suggests that the buffer zone may be justified as a means of preventing emotional or psychological distress to women seeking abortion or other pregnancy-related services at the clinic. (See maj. opn., *ante*, at pp. [13a-15a] [typed maj. opn. at pp. 13-15].) This emotional distress may in large measure be attributable to the content of the anti-abortion message, and not merely the manner in which the content is expressed. To the extent this is true, the offered justification is impermissible, for restrictions on speech may not be based on how the message affects those who receive it. (*Texas* v. *Johnson* (1989) 491 U.S. 397, 414 ["government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"]; *Organization for a Better Austin* v. *Keefe* (1971) 402 U.S. 415, 419 ["claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment"]; *Horizon Health Center* v. *Felicissimo* (Apr. 6, 1994) 135 N.J. 126, 139 [638 A.2d 1260, 1266]; see also Tribe, American Constitutional Law (2d ed. 1988) § 12-3, p. 795, fn. 4.)

B. Alternative Channels of Communication

The permanent injunction confines all picketing to the opposite side of a busy, four-lane avenue. Persons entering or leaving the clinic may not notice the protesters standing across the roadway, and unless they take the effort to cross that roadway, they will be unable to converse with the protesters in a normal tone of voice or to peruse or accept their offered literature. At this distance from persons entering and leaving the clinic, the only speech left to the protesters is that conveyed by placards and shouted slogans.

Moreover, there is a substantial risk that the protesters' message will be grossly misinterpreted by casual viewers. Because the protests must take place in front of the office of Birthright of Vallejo Benicia, those passing by, including pregnant women contemplating abortion, may assume the protest is directed against that organization, which opposes abortions, rather than against the medical clinic, which provides them.

Under these circumstances, I conclude that the permanent injunction does not leave the protesters with ample alternative channels of communication.

C. Narrow Tailoring

The majority incorrectly concludes that the prohibition here is narrowly tailored to serve a significant government interest. The government does, as the majority states (maj. opn., *ante*, p. [12a] [typed maj. opn. at p. 12)], have a significant interest in safeguarding the health and safety of people seeking medical services (see, e.g., *Beth Israel Hospital* v. *NLRB* (1978) 437 U.S. 483 [enforcing National Labor Relations Board order requiring hospital to allow union distribution of literature and solicitation in hospital cafeteria visited by patients]) and also in protecting private property and ensuring public safety (see *Horizon Health Center* v. *Felicissimo, supra,*

135 N.J. 126, 144-145 [638 A.2d 1260, 1269]). But identifying the significant government interests is only part of the constitutional requirement. A restriction on speech must be narrowly tailored to serve those interests.

The preliminary injunction allowing four picketers on the sidewalk was in effect for eleven months. Had the terms of the preliminary injunction been less than completely effective in protecting the health and safety of the clinic's patients, Planned Parenthood would surely have presented detailed evidence of specific problems during this time. Indeed, as the plaintiff in the action (see Evid. Code, § 500), and as the party seeking to restrict speech (see *Healy* v. *James* (1972) 408 U.S. 169, 184-185), Planned Parenthood was required to do so or have this crucial factual issue resolved against it. Yet the relevant evidence at trial, which I have summarized, includes no such testimony.

As this court has explained, a complete prohibition on picketing is permitted "where past picketing has become so irrevocably blended with acts of violence, physical intimidation or other unlawful conduct as to give rise to a justifiable belief that future picketing is likely to result in a continuance of the illegal acts." (*Steiner* v. *Long Beach Local No. 128* (1942) 19 Cal.2d 676, 683.) Conversely, when the picketing "has been in general lawful," even though there may have "infrequent illegal acts not of a serious character," then a total prohibition on picketing is not permitted and "only the unlawful conduct will be enjoined." (*Id.* at p. 684.) Here, the evidence fails to establish that the protesters resorted to physical violence, nor does it establish repeated and serious violations of the preliminary injunction. I therefore conclude that the more severe restrictions of the permanent injunction, completely prohibiting speech on the public sidewalk in front of the clinic, were not reasonably necessary to protect the health and safety of the clinic's patients.

The majority offers various arguments against this conclusion, but none is persuasive.

Relying on a case upholding a limitation on noisy demonstrations (*Grayned* v. *City of Rockford* (1972) 408 U.S. 104, 106), the majority appears to suggest that the total ban on picketing within the sidewalk buffer zone is necessary to protect the patients inside the clinic from disturbance. (Maj. opn., *ante*, at p. [12a] [typed maj. opn. at p. 11].) But another portion of the permanent injunction, the legality of which is not before us, prohibits the picketers from "making any noise that can be heard inside the premises." Because this other provision adequately protects the patients inside the clinic from disruption, and because there is no credible evidence that sidewalk protesters generated excessive noise during the life of the preliminary injunction, the ban on picketing in front of the clinic may not be justified as a noise prevention measure.

The majority relies heavily on *Frisby* v. *Schultz*, *supra*, 487 U.S. 474, as supporting a complete prohibition of picketing directed against "captive" listeners. (Maj. opn., *ante*, at p. [12a] & fn. 6 [typed maj. opn. at p. 12 & fn. 6].) In *Frisby*, the United States Supreme Court upheld an ordinance prohibiting picketing " 'before or about the residence or dwelling of any individual . . . .' " (487 U.S. at p. 477.) The court found there were ample alternative opportunities for the exercise of free speech, emphasized the unique nature of the home as a citadel of repose, and concluded that the picketing in that case was not directed at the public. (*Id.* at pp. 485-486.)

The reasoning of *Frisby* does not support the majority's result here. This case involves picketing of a medical clinic, not a residence. The ample alternatives to picketing cited in *Frisby*—such as the ability of protesters to distribute literature door to door (487 U.S. at p. 484)—do not exist here because the anti-abortion protesters cannot effectively reach their intended audience—pregnant women contemplating abortion—by distributing lit-

erature door to door. Their message, moreover, *is* directed to the public. Finally, the problem of "captive" listeners, to the extent it may once have existed in this case, has been effectively eliminated. The injunction expressly prohibits activity physically obstructing passage to and from the clinic, and Planned Parenthood presented no evidence at trial that passage was in fact obstructed during the life of the preliminary injunction.

Next, the majority asserts that the blanket prohibition against picketing in front of the clinic is necessary to prevent emotional trauma to patients entering the clinic, trauma which in some cases could endanger the health of the patients. As I have previously discussed, any such justification must be based on the manner rather than the content of the expression. Certainly, a court has the authority and obligation to enjoin any mode of expression that amounts to harassment or intimidation and that poses a significant health risk. And, just as certainly, pregnant women seeking access to health services, including abortion, must be protected from serious emotional trauma caused by abusive forms of expression. But the record in this case contains no evidence that women entering Planned Parenthood's clinic were subjected to any such harassment or intimidation during the 11-month life of the TRO and preliminary injunction. Thus, the emotional wellbeing of the clinic's patients had already received effective protection without the permanent injunction's total prohibition on speech within the buffer zone.

The majority accurately states that buffer zones around abortion clinics are "widely employed by state and federal courts in the context of anti-abortion protests." (Maj. opn., *ante*, p. [18a] [typed maj. opn., p. 18].) But the majority fails to acknowledge that these same courts have either allowed a limited number of protesters within the buffer zone (e.g., *Northeast Women's Center, Inc.* v. *McMonagle* (3rd Cir. 1991) 939 F.2d 57, 63-64 [six picketers permitted]; *Fargo Women's Health* v. *Lambs of Christ* (N.D. 1992) 488 N.W.2d 401, 407-408 [two

picketers permitted]), or they have drawn the boundaries of the buffer zone so narrowly that protesters standing outside can still communicate effectively with persons entering and leaving the clinic (e.g., *Pro-Choice Network* v. *Project Rescue* (W.D.N.Y. 1992) 799 F.Supp. 1417, 1434 [clear zone of only 15 feet from clinic entrances]; *Planned Parenthood Ass'n* v. *Holy Angels Catholic Church* (N.D.Cal. 1991) 765 F.Supp. 617, 626 [clear zone of only 25 feet from clinic extrances]; *Bering* v. *Share* (Wash. 1986) 106 Wash.2d 212, 229-231 [721 P.2d 918, 929-931] [picketing permitted on sidewalk next to, but not in front of, medical facility].)

Most recently, in *Horizon Health Center* v. *Felicissimo, supra,* 135 N.J. 126 [638 A.2d 1260], the New Jersey Supreme Court considered the validity of an injunction that prohibited all picketing on a public sidewalk in front of an abortion and family planning clinic. The injunction followed a noisy demonstration by 120-140 anti-abortion protesters that had blocked not only the sidewalk, but also a portion of the street in front of the clinic, and that had caused half of the women scheduled to appear at the clinic to cancel their appointments.

Nonetheless, the New Jersey Supreme Court concluded that the facts of the case "lend themselves to a more permissive restriction than the one the trial court imposed," and that "rather than prohibiting all expressional activities on the sidewalk directly in front of the [clinic], the injunction should have allowed a limited, controlled form of expression near the entrance while restraining the troublesome mass of protestors to a location across the street." (*Horizon Health Center* v. *Felicissimo, supra,* 135 N.J. 126, 152 [638 A.2d 1260, 1273].) Unlike the majority in this case, the New Jersey Supreme Court recognized its obligation to balance the protected interests of *both* the demonstrators and the patients: In the court's words, "The injunction should give consideration to the right of the protestors to make their presence

known and to the role of sidewalk counselling in that process, while at the same time protecting against any harassment of the patients or others who wish to enter the clinic." (*Id.* at p. 151, 638 A.2d at p. 1273.)

Admittedly, the constitutional requirement of narrow tailoring does not mean that a time, place, and manner restriction on speech must be the "least restrictive" alternative (*Ward* v. *Rock Against Racism*, *supra*, 491 U.S. 781, 798.) But it emphatically *does* mean that any such restriction may not burden "substantially more speech than is necessary to further the government's legitimate interests." (*Id.* at p. 799; see also, *Carroll* v. *Princess Anne* (1976) 393 U.S. 175, 183 [stating that an order restricting peaceful picketing "must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order"].) Here, the issue posed by the sidewalk prohibition is not just "quibbling over a few feet," as the majority would have us believe. (Maj. opn., *ante*, p. [21a] [typed maj. opn at p. 21].) The difference between the preliminary injunction, allowing carefully restricted speech within the buffer zone, and the permanent injunction, exiling all protesters across a broad avenue, is substantial and must be fully justified. The record utterly fails to provide the required justification.

For these reasons, the permanent injunction's sidewalk restriction, totally prohibiting speech within the buffer zone, does not satisfy the constitutional requirement of narrow tailoring.

IV. CONCLUSION

In this case, anti-abortion protesters sought to express their views in front of a medical clinic by picketing and distributing literature, protected First Amendment activities that cannot be enjoined merely because the anti-abortion content of the message is offensive or even upsetting to the clinic's staff and to women seeking abor-

tion services. The abortion protesters sought to engage in these activities on a public sidewalk, a place that by long tradition has been recognized as an appropriate and constitutionally protected site for expression protected by the First Amendment. The clinic, for its part, has sought to prevent activities by the protesters that threaten the health of its patients or otherwise substantially interfere with its operations.

The trial court granted a preliminary injunction allowing only four protesters on the sidewalk, limiting the noise level of the protests, and barring obstructive behavior. The 11-month life of the preliminary injunction was ample to test its effectiveness in controlling abusive and obstructive conduct by the protesters. Had the protesters resorted to physical violence at any time, or had they committed serious and willful violations of the preliminary injunction, I would have no hesitation in affirming an order excluding them from the sidewalk buffer zone. As I said earlier, courts have the authority and the obligation to protect pregnant women seeking access to health services from serious emotional trauma caused by abusive methods of expression. But the record contains no evidence from which this court can conclude with any sort of confidence that the preliminary injunction was at all inadequate to protect the health and safety of the clinic's patients.

The sensitive adjustment of competing rights and interests that the federal Constitution requires was achieved in this case by the preliminary injunction. There was no need, practically or legally, to banish the protesters to the opposite side of the street, thereby barring them from peacefully expressing their views on the public sidewalk in front of the clinic. Therefore, I must conclude that the permanent injunction's sidewalk restriction is invalid under the First Amendment to the United States Constitution.

KENNARD, J.

APPENDIX B

[Filed Aug. 1, 1991]

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SOLANO
DEPARTMENT THREE

No. 110090

PLANNED PARENTHOOD SHASTA-DIABLO INC.,
a California Not For Profit Corporation,
Plaintiff,

vs.

CHRISTINE WILLIAMS, individually, CITIZENS FOR LIFE, BIRTHRIGHT OF VALLEJO, an unknown entity, and THAT CLASS OF PERSONS ACTING IN CONCERT WITH NAMED DEFENDANTS, DOES 1-300, inclusive,
Defendants.

ORDER ON PERMANENT INJUNCTION

The above-entitled application for a permanent injunction came on regularly for a court trial on April 18, 1991 before this court. Karen Anderson Ryer appeared as counsel for plaintiff and John R. Streett appeared as counsel for defendants.

Evidence was thereafter introduced and heard in less than four hours, legal memorandums filed and the matter submitted for decision. A statement of decision was not requested.

THE COURT FINDS:

1. Plaintiff is one of two businesses which lawfully occupies a one story office building located at 990 Broadway, Vallejo, Solano County, California;

2. The parking lot immediately adjacent to and surrounding plaintiff's premises provides parking for its physicians, staff and clients;

3. Broadway, the street immediately in front of plaintiff's premises, is a busy avenue, with light commercial establishments on either side of plaintiff's premises;

4. The sidewalk in front of plaintiff's premises is punctuated with driveways servicing this commercial area;

5. Defendants CHRISTINE WILLIAMS and SOLANO CITIZENS FOR LIFE confront and intimidate women seeking plaintiff's services and force plastic replicas of fetuses and "counseling" upon plaintiff's staff and clients;

6. Plaintiff must escort its clients through picket lines and defendant's "picketers/counselors" in its parking lot.

7. Defendants and their picketers/counselors stand directly in front of plaintiff's office door and interfere with or obstruct entrance to and from plaintiff's clinic;

8. Defendants and their picketers/counselors write down the license plate numbers of plaintiff's staff and clients and photograph them;

9. Defendants and their picketers/counselors have called staff "murderers" or asked them not to "kill babies" in the presence of small children;

10. Defendants and their picketers/counselors have pursued plaintiff's clients to their cars or public transportation in an effort to distribute literature and the plastic fetuses;

11. Defendants and their picketers/counselors conduct these activities on a weekly basis and have had as many as 100 people involved;

12. Defendants and their picketers/counselors bring small children to the area who run up and down the public sidewalk in front of plaintiff's premises;

13. The conduct of defendants and their picketers/counselors have caused some of the women seeking coun-

selling or services from plaintiff to become emotionally distraught.

IT IS ORDERED that defendant CHRISTINE WILLIAMS and SOLANO CITIZENS FOR LIFE and their agents, representatives, employees and members, and each of them, and each and every person acting at the direction of or in combination or in concert with defendants, are permanently restrained as follows:

1. From blocking any entrance or exit to 1990 Broadway, Vallejo, Solano County, California ("PLANNED PARENTHOOD building");

2. From recording license plate numbers of cars entering or leaving the PLANNED PARENTHOOD building;

3. From photographing any persons entering or leaving the PLANNED PARENTHOOD building;

4. From referring, in oral statements while at the picket site, to physicians, staff, or clients as "murdering" or "murderers," "killing" or "killers;" or to children or babies being "killed" or "murdered" by anyone in the PLANNED PARENTHOOD building in the presence of children under the age of 12;

5. From shouting at or touching physicians, staff or patients entering or leaving the PLANNED PARENTHOOD building or making any noise that can be heard inside the premises;

6. From blocking the walkway and obstructing any physician, staff or patient entering or leaving the PLANNED PARENTHOOD building;

7. All picketing, demonstrating or counseling at the PLANNED PARENTHOOD building shall only take place along the public sidewalk across the street from the PLANNED PARENTHOOD building.

8. Defendants and their picketers/counselors shall not offer literature or plastic fetuses to any person who has refused such items.

/s/ Dennis Bunting
DENNIS BUNTING
Judge of the Superior Court

APPENDIX C

[Filed Feb. 5, 1993]

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

A055117

(Super. Ct. No. 110090
Solano County)

PLANNED PARENTHOOD SHASTA-DIABLO INC.,
Plaintiff and Respondent,

v.

CHRISTINE WILLIAMS, *et al.*,
Defendants and Appellants.

This is an appeal from a final judgment granting a permanent injunction against anti-abortion protesters. The protesters have targeted the staff and clientele of a Planned Parenthood clinic in Vallejo. The evidence established that appellants Christine Williams and members of Citizens for Life have entered private property at the Vallejo clinic to confront and intimidate women seeking abortion services and have also obstructed the entrances to the clinic. In order to protect Planned Parethood's patients and staff, the trial court imposed place and manner restrictions on appellants' ongoing protest. Appellants have appealed from the judgment imposing the permanent injunction. We affirm in part and reverse in part.

FACTS

Planned Parenthood operates a family planning clinic in Vallejo. The clinic is in a single-story office building which it shares with another tenant, a tax service. There is a parking lot on one side and to the rear of the building; this lot is for the exclusive use of the clinic and tax service. There is a narrow public sidewalk in front of the building which is intersected by two driveway entrances which lead to the building parking lot. The main door to the clinic is toward the rear of the office building, well off the street and public sidewalk.

In March of 1990 appellants and other demonstrators began gathering at the clinic, primarily on Thursdays when abortions were performed. There were often six or more demonstrators and they often brought children. The demonstrators protested by picketing directly in front of the office building on the public sidewalk. Some picketers walked very slowly across the driveway entrance to the clinic parking lot, thus delaying or preventing cars from entering.

As part of their tactics to prevent abortions, the protesters also stationed two "counselors" near the entrance to the clinic building. These "counselors" would approach the clinic's patients as they entered and would offer them anti-abortion literature and plastic fetuses. At times, the "counselors" would tell the patients that they were killing a baby, and admonish them that the Bible condemns abortion. The "counselor" often stood directly in front of the doorway to the clinic, making it difficult to enter or exit. In order to protect their patients from the "counselors," the clinic was forced to employ volunteers to escort the patients from the parking lot to the clinic entrance.

In addition to pressuring the clinic's patients, the protesters also targeted the staff. On at least one occasion, the protestors called a clinic nurse a "murderess" and exhorted her not to "kill" babies. Finally, the protesters

photographed the clinic patients and staff and recorded the license numbers of their cars.

Based on this evidence,[1] the trial court granted a permanent injunction against appellants, enjoining them from: (1) blocking any entrance to the clinic building; (2) photographing any person entering or leaving the clinic; (3) recording license plates or cars entering or leaving the clinic; (4) "referring, in oral statements while at the picket site, to physicians, staff, or clients as 'murdering' or 'murderers,' 'killing' or 'killers;' or to children or babies being 'killed' or 'murdered' by anyone in the PLANNED PARENTHOOD building in the presence of children under the age of 12"; and (5) shouting at or touching clinic staff or patients or making any noise that can be heard inside the clinic. Finally, the injunction restricts all picketing, demonstrating and "counseling" to the public sidewalk *across the street* from the clinic.

Appellants have appealed from this judgment.

DISCUSSION

Appellants challenge the injunction to the extent it: (1) excludes them from the clinic parking lot; (2) ex-

[1] In stating the facts in this case, we have relied on the record pertinent to the permanent *and* preliminary injunctions since it appears the trial court based its final decision on the *entire* record before it. Appellants would have us restrict our review of the record to the hearing on the permanent injunction only, and to ignore the record of the preliminary injunction. We decline to do so. First, it appears that the court at least implicitly took judicial notice of its own records (including those pertinent to the preliminary injunction) in rendering the permanent injunction. (Evid. Code, § 452, subd. (d).) Second, appellants have not requested that all of the proceedings below be transcribed and included in the record on appeal. Significantly, the record does not contain transcripts of the closing arguments or of a motion made by defendant at the end of trial. Consequently, on this record, appellants have not carried their burden to affirmatively show error by proving that the trial court did *not* rely on the record of the preliminary hearing in rendering its final decision. (9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 268, pp. 276-277.)

cludes them from the public sidewalk directly in front of the clinic; and (3) restricts the content of their speech by preventing them from using certain specified language in front of children while at the protest site. We consider each contention separately.

A. *Exclusion From the Clinic Parking Lot*

1) *Standing*

The permanent injunction states that "[a]ll picketing, demonstrating or counseling at the PLANNED PARENTHOOD building shall *only* take place along the public sidewalk across the street from the PLANNED PARENTHOOD building." This means, of course, that the demonstrators and counselors are enjoined from entering the clinic parking lot and from stationing themselves in front of the clinic entrance.

Appellants contend this place restriction is invalid because the clinic did not show it had a possessory interest in the parking lot adjoining the office building. Consequently, according to appellants, the clinic had no "standing" to exclude the protesters from the parking lot. We disagree.

The trial court found that "[t]he parking lot immediately adjacent to and surrounding [Planned Parenthood's] premises provides parking for its physicians, staff, and clients." A declaration introduced at the hearing on the preliminary injunction states that the parking lot "is *solely* for the use of customers and clients of the tax service and Planned Parenthood." (Emphasis supplied.) No contrary evidence was introduced at trial. In our view, this was sufficient to establish the clinic's "possessory interest" in the parking lot, and the court properly concluded that the clinic had standing to enjoin interference with that right.

More important, this court has recently recognized that an operator of a family planning clinic has "inter-

ests other than mere ownership which support a permanent injunction against anti-abortion activities in the clinic's parking lot. Those rights include " 'freedom from disruption of normal business operations and freedom from interference with customer convenience. [Citation.]' " (*Allred* v. *Shawley* (1991) 232 Cal.App.3d 1489, 1502.) These interests furnish an independent basis for standing to bring suit, regardless of the clinic's right to exclusive possession of the parking lot. (See also *Right to Life Advo.* v. *Aaron Women's Cl.* (Tex.App. 1987) 737 S.W.2d 564, 570-571 [women's clinic had an independent basis for standing to bring suit to enjoin anti-abortion demonstrations in adjoining parking lot, apart from its rights under a lease, since it was a specific target of the demonstrations and had a personal stake in the controversy].)

In short, it is ludicrous to assume that a family planning clinic has no "standing" to enjoin activities which are claimed at disrupting and impeding its lawful business. The clinic's "standing" does not turn on whether it has a sufficient possessory interest in the parking lot, but on whether it has shown the activities in the parking lot have disrupted its normal business operations and have interefered with customer convenience. On this record, there is no question the clinic has met this burden.

2) *Public Forum*

Appellants next contend that excluding them from the parking lot violates Article 1, section 2 of the California Constitution because the parking lot is a public forum.[2] We disagree.

Appellant's rely on a line of cases culminating in *Robins* v. *Pruneyard Shopping Center* (1979) 23 Cal.3d 899.

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[2] Appellants do not contend that the restriction violates the First Amendment to the United States Constitution, which the United States Supreme Court has construed more narrowly in this context. (*Planned Parenthood* v. *Wilson* (1991) 234 Cal.App.3d 1662, 1668, 1669, fn. 5.)

They cite these cases for the proposition that under the California Constitution the clinic parking lot is a public forum from which the protesters may not be excluded. *Robins* does not control this case. In *Robins* our Supreme Court held that Article 1, section 2 of the California Constitution protects the exercise of nondisruptive free speech and petition rights in a large private shopping mall. The *Robins* court recognized that central business districts have yielded many of their historic functions to the suburban shopping mall, and that such malls are, in essence, public forums. (*Robins, supra,* at pp. 907, 910, fn. 5). The *Robins* court emphasized that the size of the shopping mall is an important factor. (*Id.*, at pp. 902, 910-911.) The court cautioned that " '[i]t bears repeated emphasis that we do not have under consideration the property or privacy rights of an individual homeowner or the proprietor of a modest retail establishment.' " (*Id.*, at p. 910.)

Far more relevant to the present case than *Robins* are recent opinions which specifically uphold the exclusion of anti-abortion protesters from clinic parking lots. In *Planned Parenthood* v. *Wilson, supra,* 234 Cal.App.3d 1662, the Fourth District upheld an injunction preventing anti-abortion protesters from entering a clinic parking lot to conduct anti-abortion activities. (*Id.*, at pp. 1666, 1674.) The *Wilson* court distinguished *Robins* on the ground that the retail establishment under consideration there- -a three-story medical center housing six tenants— was not similar to the quasi-public forum created by a large suburban shopping center, but was more akin to the "modest retail establishment[s]" specifically excluded from the *Robins* rule. (*Planned Parenthood* v. *Wilson, supra,* at pp. 1671-1672.)

Similarly, in *Allred* v. *Shawley, supra,* 232 Cal.App.3d 1489, the court upheld an injunction banning anti-abortion protesters from the parking lot of a clinic housed in a 14,000 square foot office building containing 10 tenants. (*Id.*, at pp. 1494-1495, 1505.) The court re-

jected the notion that the parking lot was a public forum, concluding that "the professional center had continually maintained the private character of its parking lot and had not invited the public *generally* to use the property." (*Id.*, at p. 1502, emphasis supplied.)

Here, the building under consideration is even smaller and more private than those considered in *Wilson* and *Allred*. The clinic contains only two tenants, and the parking lot is reserved for the exclusive use of their employees and clients. The clinic parking lot is not open to "the public generally." Consequently it is not a public forum where appellants are *entitled* to exercise their right to free speech.

B. *Exclusion From The Public Sidewalk Directly in Front of The Clinic Building*

Again, the permanent injunction states that "[a]ll picketing, demonstrating or counseling at the PLANNED PARENTHOOD building shall only take place along the public sidewalk *across the street* from the PLANNED PARENTHOOD building." This means, of course, that the demonstrators may not gather or picket on the public sidewalk directly in front of the clinic building. Appellants contend that this place restriction is invalid. We uphold the restriction as necessary to protect a woman's right to procreative choice on the basis of our state constitutional right to privacy. (Cal. Const., art. I, § 1.)

Unlike the clinic's private parking lot, the sidewalk in front of the clinic *is* a public forum where speech is entitled to heightened protection. (*Frisby* v. *Schultz* (1988) 487 U.S. 474, 479-480.) "The 'public forum' doctrine holds that restrictions on speech should be subject to higher scrutiny when, all other things being equal, that speech occurs in areas playing a vital role in communications--such as in those places historically associated with first amendment activities, such as streets, *sidewalks*, and parks—especially because of how indispensable communi-

cation in these places is to people who lack access to more elaborate (and more costly) channels." (Tribe, American Constitutional Law (2d ed. 1988) § 12-24, p. 987, fns. omitted, emphasis supplied.)

"In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed. . . . In these quintessential public forums, the government may not prohibit all communicative activity. . . . The State may[, however,] enforce regulations of the time, place, and manner of expression which are [1] *content neutral,* [2] *are narrowly tailored to serve a significant government interest, and* [3] *leave open ample alternative channels of communication.* [Citations.]" (*Perry Ed. Assn.* v. *Perry Local Educators' Assn.* (1983) 460 U.S. 37, 45, emphasis supplied; quoted in *Chico Feminist Women's Health Center* v. *Scully* (1989) 208 Cal.App. 3d 230, 244.)

The restriction requiring appellants to stay on the opposite side of the street from the clinic is clearly content neutral. It does not refer to the specific viewpoints that the demonstrators press, nor to the issues raised at the demonstration. Instead, it focuses exclusively on the location and manner of expression. (*Portland Fem. Women's H. Ctr.* v. *Advocates For Life* (9th Cir. 1988) 859 F.2d 681, 686.) The restriction thus passes this threshold test.

The clinic contends the restriction is also narrowly tailored to serve two significant government interests: (1) the state's interest in keeping public sidewalks and streets open and unimpeded; and (2) the interest in protecting a woman's constitutional right to privacy. We examine each contention separately.

We agree with the clinic that the place restriction is intended to (and does) serve the "significant government interest" of keeping the street and sidewalk free of obstacles which could block the free flow of vehicle and pedestrian traffic. (*Cameron* v. *Johnson* (1968) 390 U.S.

611, 612-613, fn. 1, 617 [Statute prohibiting pickets from interfering with free use of streets or sidewalks is " 'a valid law dealing with conduct subject to regulation so as to vindicate important interests of society and . . . the fact that free speech is intermingled with such conduct does not bring with it constitutional protection.' (Citation.)"]; *Thompson* v. *Police Dept. of New York* (Sup. 1989) 546 N.Y.S.2d 945, 947; *Bering* v. *Share* (Wash. 1986) 721 P.2d 918, 926.)

Witnesses described the sidewalk in front of the building as "small"; this description is confirmed by photographs in the record.[3] The demonstrators' "standard procedure" is to have two to eight picketers walk up and down the sidewalk in front of the clinic while carrying large signs. This could easily block pedestrian traffic on the sidewalk. Moreover, witnesses testified that picketers would sometimes walk so slowly across the driveway leading to the clinic parking lot "that people [in their cars] have to sit in the street and wait to turn for a long time, or a lot of clients turn into the adjacent building to go through into the parking lot."

The more difficult question, however, is whether the provision completely prohibiting the protesters from conducting *any* activities on the sidewalk in front of the clinic is "narrowly tailored" to serve that significant government interest. The most analogous authority on this point comes from the Supreme Court of Washington. In *Bering* v. *Share, supra,* 721 P.2d 918, the Washington Supreme Court considered the validity of an injunction which banished anti-abortion protesters to a site around the corner from the entrance to a medical clinic. (*Id.* at pp. 921-923.) The court concluded that the place restriction was *not* narrowly tailored to serve the significant government interest in maintaining free ingress and

[3] Although no measurements are provided in the record, based on the photographs it appears that the sidewalk is approximately four to six feet wide.

egress to the medical clinic. The court noted that "[w]ith respect to the State's interest in maintaining ingress and egress, the injunction arguably could be narrowed without compromising that interest. The injunction could (1) limit the number of picketers, (2) require them to remain a certain distance from the walkway leading to the entrance, (3) require them to picket in single file, or (4) all of the above. By narrowing the injunction, the State could serve its significant interest in maintaining convenient access to medical care without unduly limiting the picketers' expressive activities."[4] (*Id.*, at p. 930.)

Similarly, in the present case, it may be that the injunction could be narrowed without compromising the state's interest in maintaining the free flow of pedestrian and vehicle traffic. For example, the injunction could limit the number of picketers, limit the area of the sidewalk where the picketers could stand, and explicitly prohibit the picketers from blocking or delaying cars entering the clinic parking lot. These lesser measures might fully protect the state's interest in maintaining the free flow of traffic.

Nevertheless, the clinic contends the place restriction *is* "narrrowly tailored" to serve another substantial government interest: namely, the state's interest in protecting a woman's constitutional right to privacy. The clinic again finds support for this argument in *Bering* v. *Share*, *supra*. As indicated, in that case the lower court restricted anti-abortion protesters to a public sidewalk around the corner from a medical clinic entrance. (721 P.2d at pp. 922-923.) After rejecting an argument that the restriction was narrowly tailored to serve the state's

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[4] Although the Washington Supreme Court concluded that the restriction was not "narrowly tailored" to serve the government interest in maintaining free ingress and egress, that court nevertheless upheld the place restriction on the ground it was necessary to protect a woman's constitutional right to privacy. (*Bering* v. *Share*, *supra*, 721 P.2d at p. 930.) We discuss this point in greater detail, *post*.

interest in maintaining easy access to the clinic (see discussion, *ante*, pp. 11-12), the Washington Supreme Court held that the place restriction was narrowly tailored to further the state's interest in protecting a woman's constitutional right to privacy. The court reasoned: "An injunction which permitted any anti-abortion picketing on the [entrance] sidewalk would not adequately serve the State's *compelling* interest in protecting a woman's constitutional right of privacy from the coercive impact generated by the presence of the picketers in front of the Medical Building. In the absence of a place restriction, women visiting the clinic for abortion-related services would be forced to walk a gauntlet of placard-carrying anti-abortionists. Even if all picketers agreed to refrain from using 'harassing language', it is difficult to ascertain what constitutes 'harassment' in the apprehensive mind of a woman coming face-to-face with the picketers. By restraining picketing to [the sidewalk around the corner], the court can avoid conjecture on this point, knowing that the woman's right of privacy is protected to the extent permissible under the First Amendment." (*Id.*, at p. 930, emphasis supplied.)

The *Bering* court based its reasoning on the federal constitutional analysis in *Roe* v. *Wade* (1973) 410 U.S. 113. Under *Roe* and its progeny, the courts upheld limitations on a woman's right to an abortion only if the limitations survived "strict" constitutional scrutiny—"that is, only if the governmental entity imposing the restriction [could] demonstrate that the limitation is both necessary and narrowly tailored to serve a compelling governmental interest." (*Planned Parenthood* v. *Casey* (1992) 120 L.Ed.2d 674, 711 (plur. opn.) and 749 (conc. and dis. opn. of Blackmun, J.).)

Recently, in *Planned Parenthood* v. *Casey*, *supra*, a plurality of the United States Supreme Court abandoned the strict scrutiny test in the abortion context. (120 L.Ed. 2d 674.) In *Casey*, Justices O'Connor, Kennedy and

Souter held that a regulation touching on abortion is *valid* unless it imposes an "undue burden" on a woman's ability to choose to have an abortion. (*Id.*, at pp. 712-715.) The plurality explained that a regulation imposes an undue burden "if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." (*Id.*, at p. 715.)

The Washington Supreme Court clearly relied on the *Roe* strict scrutiny standard in upholding the place restriction in *Bering* v. *Share*. The court stated that "for the purpose of defining a State's interest in a reasonable place restriction, this court recognizes the *constitutional protection* afforded the right to an abortion." (721 P.2d at p. 928, fn. 3, emphasis supplied.) At the time *Bering* v. *Share* was decided, the constitution shielded the right to abortion from any regulation which was not "both necessary and narrowly tailored to serve a compelling governmental interest." (*Planned Parenthood* v. *Casey*, *supra*, 120 L.Ed.2d at pp. 749 (conc. and dis. opn. of Blackmun, J.), 711 (plur. opn.).) As interpreted by *Planned Parenthood* v. *Casey*, however, the federal Constitution now prohibits only those regulations which impose an "undue burden" on the right to choose an abortion. Obviously, the "undue burden" standard permits more regulation than does the "strict scrutiny" standard.

Turning to the case at bench, we believe the correct inquiry under the *federal* Constitution is whether allowing some form of protest on the sidewalk directly in front of the clinic would necessarily impose an "undue burden" on the patient's right to choose an abortion.[5] It is ques-

[5] We agree with the Washington Supreme Court that, even though appellants are not state actors, we must look to "the constitutional protection afforded the right to an abortion" to determine whether a place restriction is valid. (*Bering* v. *Share*, *supra*, 721 P.2d at pp. 927-928, fn. 3.) That is, the "significant government interest" proffered to support a place restriction must be

tionable whether the blanket injunction banning the protesters to the opposite side of the street could survive under this standard. However, we need not address this issue because our state Supreme Court has interpreted our state Constitution to require broader protection of a woman's right to choose an abortion than is afforded under the federal Constitution.

In *Committee to Defend Reproduction Rights* v. *Myers* (1981) 29 Cal.3d 252 (hereafter *Myers*), our Supreme Court concluded that the explicit right to privacy found in the California Constitution is broader than the implicit right to privacy in the federal Constitution. Consequently, the *Myers* court held that "the protection afforded the woman's right of procreative choice as an aspect of the right of privacy under the explicit provisions of our [state] Constitution is *at least* as broad as that described in *Roe* v. *Wade*." (*Id.*, at p. 281, emphasis supplied; see also *Robbins* v. *Superior Court* (1985) 38 Cal.3d 199, 213; *Conservatorship of Valerie N.* (1985) 40 Cal.3d 143, 163-164; Cal. Const., art. I, § 1.) Moreover, the California Constitution is a document " 'of independent force' " and we are obliged "to interpret the safeguards guaranteed by the California Constitution in a manner consistent with the governing principles of California law." (*Myers, supra,* 29 Cal.3d at p. 261.) This means that, even after *Casey*, we are compelled by our *state* Constitution to strike down restrictions on a woman's right of procreative choice unless the restriction is narrowly tailored to serve a compelling governmental interest. (*Conservatorship of Valerie N., supra,* 40 Cal.3d at pp. 163-164; *Vannier* v. *Superior Court* (1982) 32 Cal.3d 163, 178 (conc. and dis. opn. of Bird, C.J.); *Myers, supra,* 29 Cal.3d at pp. 279-281.)

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defined by the constitutional right the court seeks to protect. (*Perry Ed. Assn.* v. *Perry Local Educator's Assn., supra,* 460 U.S. at p. 45.)

In conclusion, under California law, the "compelling interest test" still applies even after *Casey*. Since the constitutional underpinning of *Bering* is still in place in California—and because we find that case persuasive—we choose to follow it.

Finally, the injunction also leaves open ample alternative means of communication. Even though the protesters are restricted to the opposite side of the street, they are still clearly visible to those entering or leaving the clinic. Thus, the protesters can communicate their message through placards or signs.

Because the restriction meets the three part test set out in *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, *supra*, 460 U.S. at p. 45, we uphold the portion of the injunction restricting the protesters to the opposite side of the street.

C. *Content Restriction*

Finally,[6] appellants contend paragraph 4 of the injunction is invalid because it impermissibly restricts the content of their speech. We agree.

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[6] Appellants also make a substantial evidence argument which we may dismiss in a footnote. They contend that the following provisions of the injunction are not supported by substantial evidence: (1) The paragraphs prohibiting them from recording license numbers or photographing persons entering the clinic and (2) the paragraph prohibiting them from touching staff or patients or making noise that can be heard inside the building. Appellants' argument is based on the mistaken premise that the court could only consider the evidence introduced at the hearing on the permanent injunction. As we have already indicated, we may assume the court considered the entire record before it. (See *ante*, fn. 1.) Read in its entirety, the record supports the trial court's findings and orders. (See *Chico Feminist Women's Health Center* v. *Scully*, *supra*, 208 Cal.App.3d at pp. 237-238, 248, 250 [upholding injunction prohibiting anti-abortion protesters from recording license numbers or photographing persons at the clinic]; *Planned Parenthood* v. *Wilson*, *supra*, 234 Cal.App.3d at pp. 1666, 1674 [affirming preliminary injunction which enjoined protesters from

The court found that the protesters "have called staff 'murderers' or asked them not to 'kill babies' in the presence of small children." Consequently, paragraph 4 of the permanent injunction enjoins appellants from making oral statements while at the picket site, in the presence of children under the age of 12, that refer to Planned Parenthood's "physicians, staff, or clients as 'murdering' or 'murderers,' 'killing' or 'killers;' or to children or babies being 'killed' or 'murdered' by anyone in the PLANNED PARENTHOOD building . . . ."

The clinic's argument in support of this restriction is again based on the Washington Supreme Court's opinion in *Bering* v. *Share*. There, the lower court issued an injunction with a content restriction nearly identical to that in the present case, except that it was not limited to statements made in the presence of children under 12. (721 P.2d at p. 924.) The Washington Supreme Court first noted that the restriction was not invalid under the prior restraint doctrine, and that, in any event, the United States Supreme Court had abandoned the prior restraint doctrine in several recent opinions. (*Id.*, at p. 932.) Instead, according to the Washington high court, the correct test for limitations on the content of speech is whether the content restriction is "'. . . narrowly drawn to accomplish a compelling governmental interest.'" If it is, then the restriction is valid. (*Id.*, at p. 933, quoting *United States* v. *Grace* (1983) 461 U.S. 171, 177 and citing *Consolidated Edison Co.* v. *Public Serv. Comm'n* (1980) 447 U.S. 530, 540.)

Applying this test, the *Bering* court noted that the protesters had used the offending words in front of children who were accompanying patients of the clinic or

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"producing noise which substantially interferes with PLANNED PARENTHOOD's ability to provide safe and proper health care services"].)

had come to the medical building as patients themselves.[7] Moreover, there was expert testimony that the use of these words had " 'inflicted trauma upon the children overhearing such references and . . . by their very utterance . . . harmed the doctor-patient relationship essential to the effective delivery of health care.' " (*Bering* v. *Share*, *supra*, 721 P.2d at pp. 933, 934, 935.) Accordingly, the Washington Supreme Court concluded the state had a "compelling interest" in protecting children from the physical and psychological abuse inflicted by the picketers' speech. (*Id.*, at p. 935; see *FCC* v. *Pacifica Foundation* (1978) 438 U.S. 726.) Again, it is important to emphasize that the "children" to which the court refers are the children who came to the medical building as patients themselves or accompanied adult patients to the clinic.[8]

Although the *Bering* court concluded the content restriction did serve a compelling governmental interest, it nevertheless found the restriction too broad because it imposed a blanket restriction on speech, whether or not children were present. Consequently, the court remanded the case to the trial court to narrow the content restriction so that it would apply only when children were present. (721 F.2d at pp. 935-936.)

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[7] The medical building where the abortion clinic was located contained over two dozen offices which offered a wide range of services including pediatric, prenatal, and family oriented health care. (*Bering* v. *Share*, *supra*, 721 P.2d at p. 922.)

[8] Although the *Bering* court does not explicitly state this limitation, read as a whole, the opinion clearly indicates that the court is only concerned about children who are *coming to the clinic to receive services*, not about the children of the protesters. (*Bering* v. *Share*, *supra*, 721 P.2d at pp. 934-935 ["parents of children visiting the Medical Building are entitled to explain the concept of abortion to their children personally"; "this state has an interest in preventing the 'abuse' suffered by young children hearing the proscribed words just before they visit their doctors"; "children visiting the Medical Building cannot tune into a different station or tune out completely"].)

We decline to follow *Bering* on this point. Putting aside the issue whether the content restriction is invalid as a "prior restraint," [9] we conclude that *on this record* the clinic has not shown that the content restriction served a compelling governmental interest. The evidence introduced below shows that the *protesters* often brought their children to the clinic, and that the offending words were used in front of the *protesters'* children. The only evidence that clinic *patients* brought their children to the clinic is found in a declaration by the clinic's counsel. She stated that on one occasion, the protesters "handed a plastic fetus to a two year old who was accompanying his mother into the clinic for family planning." There is no evidence that the offending words were ever used in the presence of the clinic patients and *their* children.

Moreover, unlike the medical building in *Bering*—which offered pediatric, prenatal, and family health care —the building in this case contained only one medical office: the Planned Parenthood Clinic, which respondents themselves describe as offering "a full range of reproductive health services for *men* and *women* . . . ." Thus, it appears that the clinic did not offer medical services to children. Consequently, on this record, we are not faced with the situation in *Bering* where the offending words, "'. . . by their very utterance . . . harmed the doctor-

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[9] The dissent in *Bering* concluded that the content restriction *did* constitute a prior restraint, and that the restraint could only be upheld if "the communication restrained is constitutionally unprotected speech such as obscenity, incitement to acts of violence, or speech that directly threatens military security." (*Bering* v. *Share*, *supra*, 721 P.2d at p. 942 (dis. opn. of Dore, J.).) We decline to enter the prior restraint thicket. Instead we first consider whether the speech itself is constitutionally protected, because "'[w]here the speech in question is in all events guaranteed by the First Amendment, attributing that guarantee to the circumstance of prior restraint is at best irrelevant and often misleading.'" (Tribe, American Constitutional Law (2d ed. 1988) § 12-34, p. 1041, quoting Jeffries, *Rethinking Prior Restraint*, (1982) 92 Yale L.J. 409, 437.)

patient relationship essential to the effective delivery of health care [to children].' " (*Bering* v. *Share*, *supra*, 721 P.2d at p. 933.) In addition, unlike *Bering*, there was no expert testimony in this case which tended to show that the offending words "inflicted trauma" upon the children who heard them. (*Id.*, at pp. 933, 935-936.)

Finally, one of the primary justifications cited by the *Bering* court to support its conclusion that protection of children is a "compelling governmental interest" cuts the other way in this case. The *Bering* court noted that " 'the parents' claim to authority . . . to direct the rearing of their children is basic in the structure of our society. . . .' " (*Bering* v. *Share*, *supra*, 721 P.2d at p. 934, quoting *Ginsberg* v. *New York* (1968) 390 U.S. 629, 639.) Based on this principle, the *Bering* court concluded that "parents of children visiting the Medical Building are entitled to explain the concept of abortion to their children personally, and only when they believe the children are able to understand it." (*Bering* v. *Share*, *supra*, at p. 934.) Here, by contrast, the injunction *prevents* the protesters from expressing their *own* views to their *own* children (albeit in limited circumstances).

We are not concerned here with limitations on "indecent" or quasi-obscene speech. (Compare *Ginsburg* v. *New York*, *supra*, 390 U.S. at pp. 634, 636, 643; *FCC* v. *Pacifica Foundation*, *supra*, 438 U.S. at pp. 741, 755 (conc. opn. of Powell, J.), both of which the court relied on in *Bering* v. *Share*, *supra*.) Instead, we are confronted with an attempt to limit *political speech* in its most raw and powerful form. The Supreme Court has stated that "a *content-based* restriction on *political speech* in a *public forum* . . . must be subjected to the most exacting scrutiny." (*Boos* v. *Barry* (1988) 108 S.Ct. 1157, 1164, emphasis in original.) This is because the right to political expression lies at the "core" of the First Amendment. (*Meyer* v. *Grant* (1988) 486 U.S. 414, 420; *Buckley* v. *Valeo* (1975) 424 U.S. 1, 44-46.)

There is no question that the limitation here restricts "core political speech." (*Meyer* v. *Grant, supra,* 486 U.S. at p. 420.) Indeed, abortion may be *the* political issue of the last 20 years. Further, "[t]he words 'murder', 'kill', and their derivatives play an essential role in the debate concerning abortion. To those opposed to abortion, the logical conclusion of that moral position is that abortions result in babies being killed or murdered. If the court were to deprive picketers of the words which most clearly [and powerfully] embody the moral position of those picketers, it would eviscerate completely the debate concerning abortion. Just as abortion proponents must be able to articulate their belief that abortion is constitutionally justified as an aspect of a woman's right to procreative freedom, [citation], so must abortion opponents be permitted to articulate their belief that abortion should not be permitted because it involves the taking of human life." (*Bering* v. *Share, supra,* 721 P.2d at p. 943 (dis. opn. of Dore, J.).)

D. *Disposition*

To summarize, we strike paragraph 4 of the permanent injunction as an unconstitutional restriction on the content of appellants' speech. In all other respects, the judgment is affirmed.

Respondents and appellants shall each bear their own costs on appeal.

WHITE, P.J.

We concur:

MERRILL, J.

WERDEGAR, J.

APPENDIX D

[Filed Mar. 3, 1993]

COURT OF APPEAL
OF THE STATE OF CALIFORNIA
IN AND FOR THE
FIRST APPELLATE DISTRICT
DIVISION: 3

A055117

Solano County No. 110090

PLANNED PARENTHOOD SHASTA-DIABLO, INC.

vs.

WILLIAMS, CHRISTINE, *et al.*

BY THE COURT:

The petition for rehearing is denied.

Dated: Mar. 3, 1993

WHITE, P.J.

APPENDIX E

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
COUNTY OF SOLANO

Case No. 110090

PLANNED PARENTHOOD SHASTA-DIABLO INC.,
a California Not For Profit Corporation,
Plaintiff,

vs.

CHRISTINE WILLIAMS, individually, CITIZENS FOR LIFE, BIRTHRIGHT OF VALLEJO, an unknown entity, and THAT CLASS OF PERSONS ACTING IN CONCERT WITH NAMED DEFENDANTS, DOES 1-300, inclusive,
Defendants.

ORDER TO SHOW CAUSE AND
TEMPORARY RESTRAINING ORDER THEREON.
[CCP Sections 526 and 527]

Upon reading the Verified Complaint of Plaintiff herein and upon reading the Declaration of counsel, the Points and Authorities submitted herewith, and it appearing to the satisfaction of the Court that this is a proper case for granting an Order to Show Cause and a Temporary Restraining Order, and that unless the Temporary Restraining Order pleaded for in the Complaint be granted, great or irreparable injury will result before the matter can be heard on notice:

IT IS HEREBY ORDERED that the above-named Defendants, Christine Williams, individually, Citizens for Life, Birthright of Vallejo, an unknown entity, and That Class of Persons Acting In Concert With Named De-

fendants, Does 1 through 300, appear in Department 3 of this Court located at 321 Tuolumne, Vallejo, California on August 24th, 1990 at 8:30 A.M., or as soon there after as this matter may be heard, then and there to show cause, if any there is, why they and their agents, servants, employees, and representatives should not be enjoined and restrained during the pendency of this action, from engaging in, committing, or performing, directly or indirectly, any and all of the following acts:

1. From blocking any entrance or exit into 990 Broadway, Vallejo, California;

2. From verbal harassment or threatened physical contact to any person coming in and out of 990 Broadway, Vallejo, California;

3. From shouting any words or making noises likely to disturb the peace of the clients and the staff of the Clinic;

4. From any acts which would cause emotional distress to clients and workers at the Clinic;

5. From bringing children to the property;

6. From taking down license numbers of cars on the property;

7. From photographing any persons coming to and going from the complex known as 990 Broadway, Vallejo, California;

8. To restrict the Defendants' picketing to the public sidewalk in front 990 Broadway, Vallejo, California;

9. To restrict pickets to two (2).

IT IS HEREBY ORDERED that copies of this Complaint, Declarations, Memorandum of Points & Authorities, this Order to Show Cause, supporting exhibits, and Temporary Restraining Order be served upon Defendants no later than August 20, 1990.

Dated: August 8, 1990

ORDER

Each of the Defendants is hereby restrained from each and all of the above-referenced acts numbered 1-9 in the Order To Show Cause and incorporated herein until the hearing on this matter.

Aug. 8, 1990

/s/ Dennis Bunting
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SOLANO

Case No. 110090

MINUTES - CIVIL

Planned Parenthood
vs/and Shasta-Diablo Inc. et al.
Christine Williams et al

Date: 9-19-90
Judge: Dennis Bunting
Reporter: Jim Clayton
Clerk: Michelle Bence

APPEARANCES:

[X] Plaintiff/Petitioner [ ] with [X] thru counsel Karen Ryer [ ] in pro p.
[X] Defendant/Respondent [ ] with [X] thru counsel John Street [ ] in pro p.
[ ] Other:

ON CALENDAR FOR:

[ ] Uncontested/default/stipulated [ ] Contested PETITION for:
[ ] Dissolution of Marriage [ ] Legal Separation [ ] Nullity [ ] Adoption [ ] Comp Minor's C.
[ ] Default Judgment re COMPLAINT for:
[X] Plaintiff/Petitioner's [ ] Defendant/Respondent's
[X] ORDER TO SHOW CAUSE [ ] MOTION [ ] DEMURRER [ ] FOR MODIFICATION [ ] CONTEMPT
[ ] Child Custody [ ] Visitation [ ] Child Support [ ] Spousal Support [ ] Attorney Fees & C:
[ ] Injunctive Order [X] Other (Specify) Preliminary Injuction
[ ] Other:

PROCEEDINGS:

[X] Case called [ ] No appearances [ ] Off calendar [ ] by the Court [ ] by stipulation of course
[ ] No proof of service received.
[ ] Petitioner [ ] Respondent [ ] Other sworn & testif:
[ ] MOTION [ ] granted [ ] denied [ ] with [ ] without prejudice.
[ ] DEMURRER [ ] sustained [ ] overruled [ ] with ___ days [ ] without leave to [ ] amend [ ] answe:
[ ] MODIFICATION [ ] granted [ ] denied [ ] ORDER TO SHOW CAUSE is discharged.
[ ] Petitioner [ ] Respondent [ ] found [ ] not found, in contempt [ ] admits contempt.
[ ] The parties waive their rights to notice of trial, statement of decision, motion for new tria:
and right to appeal.
[ ] PETITION [ ] JUDGMENT [ ] granted [ ] as prayed [ ] denied [ ] effective
[ ] STIPULATION [ ] Marital Settlement [ ] Distribution of Property Agreement [ ] approved [ ] incorpc
[ ] The Court finds defendant to be the father of minor(s):
[ ] CUSTODY of minor children: [ ] sole [ ] joint legal with physical awarded to [ ] Pet. [ ] Resp.
[ ] reasonable visitation to other party with reasonable/ notice [ ] visitation belo
[ ] Agreement of the parties re custody and visitation per Court Mediator's report dated
, is approved and the parties are directed to comply.
[ ] SUPPORT: [ ] Petitioner [ ] Respondent/Defendant to pay each month
[ ] CHILD $ per child [ ] SPOUSAL [ ] waived [ ] reserved $
[ ] FAMILY $ [ ] ARREARAGES $ for [ ] Child [ ] Spousal, support
[ ] Payments shall be made on and commencing .
[ ] through District Attorney's Family Support Division [ ] by wage assignment.
[ ] Support based upon gross/net income: Petitioner Respondent
[ ] Petitioner [ ] Respondent to maintain medical and dental insurance for the children, if
available through employment [ ] and equally share any uninsured expenses.
[ ] Pension Benefit Plan [ ] Military Retirement reserved.
[ ] Former name of wife may be restored upon entry of final judgment: .
[ ] ATTORNEY FEES [ ] COSTS [ ] reserved [ ] each party bear own [ ] Petitioner [ ] Respondent to pay
$ [ ] at rate of $ per month commencing .
[ ] Petitioner [ ] Respondent ordered to pay filing fees and costs.
[ ] Matter taken under submission [ ] after oral arguments [ ] on merits.
[ ] Briefs due [ ] 10-10-5 [ ] other: . Atty to open.
[ ] Matter referred to Mediation.
[ ] TRO [ ] granted [ ] continued as to [ ] property [ ] conduct against [ ] Petitioner [ ] Respondent.
[ ] Restraining orders to remain in effect.
[X] Atty Ryer prepare order & submit to Atty Street for approval.
The Court finds the declarations lodged by Mr Street are appropriate. The plaintiff calls as witness Janine Schoenfeld, sworn and testified, after which plaintiff makes an offer of proof. Defense Counsel, Defense Counsel states his objections, he (over)
[ ] CONTINUED: [ ] by the court [ ] by stipulation [ ] at request of
TO:

MINUTES - CIVIL

Court sustaines the objection. The plaintiff now rests. Defens Counsel calls as witness Jeanette Hammer, Sworn and testified after which defens rest. The Court asks Ms. Hammer to return to the stand so that the court can ask her some additional questions. In rebuttal plaintiffs Counsel call herself. Karen Pyer, Sworn and testified. Closing arguments were presented to the Court by Counsel. The Court finds there is no evidence to support the preliminary Injunction as to Burbright and Christ Price. The Court approves the preliminary Injunction as to Christine Williams, Solano Citizens for life, any officers, agents, representatives or employees 990 Broadway, Vallejo, Ca. Verbal Harassment any persons, Comming in or out of the Clinic, Shouting any Words to Clients and staff of plaintiffs no Children under the age of 12 years old on the property. From photographing any person comming to or going from the Clinic at 990 Broadway Vallejo, Ca. From assisting, addressing any Client or Child who has refused plastic fetus. Recording licens plates of Clients, etc. Restrict picketing and/or Counseling to the public sidewalk in front of the building. Defendants Can Maintain four (4) pickets and not more than two (2) shall be less than ten feet from any other picketer or Counselor.

SUPREME COURT, U.S.
FILED
OCT - 7 1994
OFFICE OF THE CLERK

No. 94-334

In The

Supreme Court of the United States

October Term, 1994

CHRISTINE WILLIAMS and CITIZENS FOR LIFE,

Petitioners,

vs.

PLANNED PARENTHOOD SHASTA-DIABLO, INC.,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of California

RESPONDENT'S BRIEF IN OPPOSITION

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the decision of the California Supreme Court in this case conforms to the standard announced in *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994).

PARTIES TO THE PROCEEDINGS

Respondent Planned Parenthood Shasta-Diablo, Inc., is a California non-profit corporation. It has no parent company or subsidiaries. No other corporations are parties to this action. This statement is submitted pursuant to Rule 29.1.

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Supreme Court Rule 29.1 ii

Respondent Planned Parenthood Shasta-Diablo, Inc., ("Planned Parenthood") respectfully submits this opposition to the petition for writ of certiorari to the Supreme Court of the State of California.

SUMMARY OF ARGUMENT

Petitioners ask this Court to review, summarily reverse, or vacate and remand the decision of the California Supreme Court upholding a place restriction on protest activities outside a medical clinic. The reasons cited by petitioners are: (1) The decision is in "plain conflict" with *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994); and (2) the California Supreme Court held that anti-abortion speech can be restricted *solely* because of the emotional trauma it causes. Neither of these reasons is supported in the petition.

Petitioners try to manufacture a conflict by equating the place restriction in this case with the 300-foot no-approach zone in *Madsen*. But the place restriction in this case is functionally equivalent not to the 300-foot zone that was struck but to the 36-foot zone that was upheld in *Madsen*. Nor can petitioners show that the California Supreme Court upheld the injunction solely to prevent "emotional trauma." The decision is premised not on an abstract concern about avoiding emotional trauma, but on the significant governmental interest in the health and safety of patients about to undergo surgery and other medical procedures.

To buttress these arguments, petitioners characterize the decision as "nothing less than a rationale for excluding *all* [anti-abortion] speech from *all* public sidewalks or property adjacent to abortion [clinics]." This is hyperbole. The decision creates no blanket rule governing injunctions against protesters outside of medical clinics, any more than did the decision in *Madsen* upholding the 36-foot buffer zone. On the contrary, the California Supreme Court carefully considered the specific conduct at issue,

analyzed the physical layout of the area, and upheld the place restriction as necessary *in this case* to protect the health and safety of clinic patients. The court acknowledged that the "nature and extent of injunctions in these cases differ, naturally, depending on the particular facts and geographic circumstances presented." (App. 19a). Nothing in the decision suggests that in a case with distinct facts — with a different geographic layout or involving conduct by the protesters that implicated different governmental interests — the same injunction would be appropriate.

Petitioners have provided no valid reasons to support review, summary reversal or remand of the decision. No purpose would be served in having the California Supreme Court repeat its analysis under the new standard adopted in *Madsen*. This case presents no basis for issuance of a writ of certiorari, and the petition should therefore be denied.

RESPONSE TO STATEMENT OF THE CASE

A. Factual Background

Planned Parenthood is a non-profit corporation operating a family planning clinic in Vallejo, California. (App. 2a). The clinic provides a full range of family planning, health and counseling services, including medical exams, laboratory testing and abortions. (App. 2a).

The clinic is in a single-story office building that Planned Parenthood shares with a tax service. (App. 2a). A parking lot adjoins the clinic on one side and to the rear of the building; the lot is for the exclusive use of Planned Parenthood and the tax service. (App. 2a, 45a). There is a short, narrow sidewalk in front of the office building, punctuated by driveway entrances. (App. 2a).

In March 1990, petitioners[1] started to gather at the clinic, primarily on Thursdays when abortions were performed, and began a pattern of harassment and intimidation of Planned Parenthood's patients and staff. (App. 2a-3a, 45a). The number of protesters varied from a handful to over 100. (App. 2a-3a, 45a). Petitioners frequently brought children, ranging in age from infants to teens, to the demonstrations. (App. 3a). Small children would run up and down the sidewalk next to the street. (App. 45a).

Petitioners picketed throughout the parking areas, driveways and sidewalk in front of the office building, carrying signs protesting abortion. (App. 3a, 45a). They obstructed cars entering the driveway into the clinic's parking lot. (App. 3a, 45a). As cars attempted to turn into the clinic driveway, petitioners would surround them and try to pass literature through the windows before they could be rolled up. (App. 3a). They followed patients to and from their cars or to the bus stop, attempting to hand them literature and replicas of plastic fetuses. (App. 45a). They also accosted, surrounded or followed patients on the sidewalk. (App. 16a). Petitioners also stationed "counselors" in the parking area who pressed literature and plastic fetuses on those entering the clinic. (App. 3a). On one occasion, they handed a plastic fetus to a small child after his mother had refused to take it herself. (App. 16a). They often stood directly in front of the doorway to the clinic, making it difficult to enter or exit. (App. 45a).

Petitioners' activities caused some of the patients seeking medical care or counseling at the clinic to become emotionally distraught. (App. 3a, 16a, 45a-46a). Planned Parenthood was forced to escort patients to ensure their unimpeded passage to the door of the clinic. (App. 3a, 45a). On at least one occasion, staff members had to disperse a group of picketers who were surrounding a patient on the sidewalk. (App. 3a, 16a).

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1. Petitioners are Christine Williams and Citizens for Life, an unincorporated association.

B. The Trial Court Decision

In August 1990, the trial court issued a temporary restraining order prohibiting petitioners from blocking or harassing any person coming into or out of the clinic and restricting their picketing to the sidewalk in front of the clinic. (App. 67a-69a). After a hearing, the trial court issued a preliminary injunction that restricted the number of picketers on the sidewalk to a maximum of four and required that at least two of these picketers remain ten feet apart from the other two. (App. 70a-71a).

At trial on the permanent injunction, testimony was introduced concerning petitioners' harassment and intimidation of patients and staff at the clinic. (App. 48a-49a). There was also testimony that police enforcement was necessary because picketers on the sidewalk had violated the terms of the preliminary injunction. (App. 4a, n.2).

Following trial, the court made findings, based on the uncontradicted evidence, that petitioners (1) confronted and intimidated women seeking Planned Parenthood's services; (2) interfered with or obstructed entrance to and from the clinic; (3) pursued patients to their cars or public transportation in an effort to distribute literature or plastic fetuses; (4) conducted these activities on a weekly basis, with as many as 100 people involved; and (5) caused some of the women seeking counseling or services from Planned Parenthood to become emotionally distraught. (App. 45a-46a).

In August 1991, the trial court entered judgment for Planned Parenthood, issuing a permanent injunction restricting petitioners' picketing activities to the sidewalk immediately across the street from the clinic. (*Id.*).

C. The California Supreme Court Decision

The California Supreme Court upheld the exclusion of petitioners from the sidewalk directly in front of the clinic. Conducting an independent review of the record pursuant to *Bose v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 489-511 (1984), the court concluded that the trial court's findings should not be disturbed "under any standard." (App. 2a, n.1). It held that those findings supported the sidewalk restriction as necessary to protect the health and safety of clinic patients. (App. 16a-17a).

The court reasoned that the state's responsibility for health and safety of patients seeking medical services extended well beyond the operating room. (App. 14a). Physical and emotional intimidation of patients outside the clinic, the court found, could significantly affect their course of treatment once inside by, for example, leading to inaccurate blood pressure readings, delaying or complicating treatment, and prolonging recovery. (App. 14a-16a). It pointed out that the findings of fact adopted by the trial court revealed that "it was precisely the health and well-being of the clinic's patients that constituted the court's primary concern." (App. 15a).

The court further concluded that, based on a demonstrated record of repeated harassment and intimidation, the sidewalk restriction was narrowly tailored to protect the health-and-safety interest "under the particular facts and geographic circumstances presented." (App. 19a). It reasoned that merely keeping the sidewalk clear for passage did not "address the problem identified by the trial court of protesters hounding and upsetting unwilling listeners."[2] (App. 20a). Nor, the court found, would limiting the

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2. Petitioners take issue with the characterization of their actions as "confronting" and "intimidating" patients and "forcing" literature and counseling on them. (Petition at 8-9). However, these descriptions are based on the trial court's first-hand observation of the witnesses and the physical

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number of picketers on the narrow sidewalk in front of the clinic necessarily mitigate the emotional impact on patients "forced to navigate even a limited number of pickets and sidewalk 'counselors.' " (*Id.*). It found that under "these unique circumstances, the trial court was eminently justified in concluding that the protesters' proven confrontational tactics posed an intolerable threat to the emotional health and safety of the patients, whether those tactics were resorted to by two or twenty." (App. 21a). Limiting the protestors' activities to the alternative site across the street, the court reasoned, allowed them a vantage point from which to picket and demonstrate that was reasonably close to the clinic and within plain view of their target audience. (App. 23a). The place restriction, the court concluded, therefore struck the appropriate balance between protecting the health and safety of clinic patients and allowing petitioners a reasonable forum for their protest activities. (App. 21a-23a).

(Cont'd)

evidence. Additionally, the California Supreme Court conducted an independent review of the record and found these characterizations to be fully justified. (App. 2a, n.21; 20a-20b, n.20). While petitioners may quarrel with these descriptions, this cannot provide a basis for review, as this Court made plain in *Milkwagon Drivers v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 294 (1941). There, a special master found that petitioners' picketing activities had resulted in intimidation of respondent's customers, and the Illinois Supreme Court upheld restrictions on the picketing based, in part, on such intimidation. On review, this Court declined "to make an independent valuation of the testimony before the master" to determine whether this characterization was accurate, stating:

> We have not only his findings but his findings authenticated by the State of Illinois speaking through her Supreme Court. We can reject such a determination only if we can say that it is so without warrant as to be a palpable evasion of the constitutional guarantee involved. The place to resolve conflicts in the testimony and its interpretation was in the Illinois courts and not here.

REASONS FOR DENYING THE WRIT

I.

THE DECISION OF THE CALIFORNIA SUPREME COURT IS NOT IN CONFLICT WITH *MADSEN*.

Petitioners' contention that this decision "is in plain conflict with *Madsen*" is based on two premises: first, that the place restriction in this case is "equivalent to" the 300-foot "no-approach" zone struck in *Madsen*; and, second, that because *Madsen* adopted a more stringent standard than that used by the California Supreme Court, this decision is *ipso facto* invalid. Neither premise is valid.

A. The Injunction in This Case Is Not Equivalent to the 300-Foot Zone in *Madsen*.

The place restriction in this case is the functional equivalent not of the 300-foot zone that was struck, but of the *36-foot zone* in front of the clinic that was upheld in *Madsen*. That buffer zone, as this Court observed, effectively moved petitioners to the other side of the street (Dixie Way) from the clinic and away from the clinic driveway where the state court found they had repeatedly interfered with the free access of patients and staff. (114 S. Ct. 2526). The injunction in this case accomplished the same result by requiring petitioners to confine their activities to the sidewalk across the street. However, in contrast to the injunction in *Madsen*, petitioners here were not *further* constrained by a 300-foot overlay zone prohibiting uninvited approaches. They were free to conduct their "sidewalk counseling," to distribute literature and plastic fetuses, and to approach or follow people, whether invited or not, provided they did not do so on the narrow sidewalk and driveways adjacent to the clinic.

In short, nothing in this injunction purported to bar uninvited

approaches or to impose a consent requirement on petitioners' speech activities. Hence the concerns expressed by the Court in *Madsen* about the no-approach zone (*see* 114 S. Ct. at 2529) have no application here.

II.

THE CALIFORNIA COURT'S USE OF A LESS STRINGENT STANDARD THAN THE ONE ADOPTED IN *MADSEN* DOES NOT RENDER THE DECISION INVALID.

Petitioners argue that "[r]egardless of whether the decision of the court below was defensible at the time it issued, that decision cannot survive *Madsen's* repudiation of its legal underpinnings." (Petition at 15). This argument focuses on the form of the decision and ignores its substance. In *Madsen*, the Florida Supreme Court, of course, also used the less stringent "time-place-and-manner" standard, but that did not prevent this Court from upholding significant portions of the injunction, including the 36-foot zone most comparable to the place restriction here. *See Operation Rescue v. Women's Health Center, Inc.*, 626 So. 2d 664, 667 (Fla. 1993). The issue is not whether the California Court couched its decision in the rubric of the new standard, but whether the facts of the case justified the relief granted under that standard. They clearly did.

A comparison of the facts of *Madsen* with those of this case reveals obvious and important similarities. In both cases,

- Petitioners picketed and demonstrated in various areas around the clinic, including the public sidewalk and driveways providing access to the clinic (114 S. Ct. at 2527; App. 2a, 45a; 626 So. 2d at 667). The picketing was focused primarily on patients and staff, as opposed to a more generally disseminated from of communication such as handbilling or solicitation.

(114 S. Ct. at 2527; App. 18a, 45a; 626 So. 2d at 672).

- The protesters impeded access to the clinic by, *inter alia*, marching in front of the clinic's driveways. (114 S. Ct. at 2521; App. 3a; 626 So. 2d at 667). As cars slowed to allow the protesters to move out of the way, "sidewalk counselors" approached and attempted to give occupants anti-abortion literature and counseling. (114 S. Ct. at 2521; App. 3a, 45a; 626 So. 2d at 667-68). In this case, the protesters also pursued patients as they walked from their cars to the clinic entrance — as well as along the sidewalk and across the street to the bus stop — offering "sidewalk counseling." (App. 3a, 16a, 45a).

- The number of protesters in *Madsen* varied from a handful to 400. (114 S. Ct. at 2521). In this case, the number ranged from six to over 100. (App. 2a-3a).

- As a result of having to run the gauntlet of protesters in order to enter the clinic, the patients manifested a higher level of anxiety and emotional distress. (114 S. Ct. at 2521; App. 3a, 45a-46a; 626 So. 2d at 668).

- Evidence concerning the protesters' activities following issuance of the original injunctive orders led the trial courts to conclude that these restrictions had been insufficient to accomplish their goals; accordingly the courts broadened the scope of the limitations on the protesters' activities. (114 S. Ct. at 2521, 2527; App. 4a-5a; 626 So. 2d at 667-69).

- In *Madsen*, the trial court expanded its injunction to prohibit, *inter alia*, picketing, patrolling, demonstrating or *entering* the area within 36 feet of the property line of the clinic, which effectively

> limited the protesters' activities to the opposite side of Dixie Way. (114 S. Ct. at 2522; 626 So. 2d at 669). In this case, the trial court broadened the preliminary injunction to restrict all picketing, demonstrating or counseling to the public sidewalk across the street from the clinic. (App. 5a, 46a).

On appeal in these cases, the state supreme courts both cited the governmental interests in protecting the health and safety of clinic patients as justifying imposition of the injunctive orders. (App. 11a; 626 So. 2d at 672, 673, 675). Both reasoned that the type of face-to-face confrontations to which patients were subjected as they attempted to enter the clinic to undergo medical treatment potentially jeopardized their health and safety. (App. 14a-16a; 626 So. 2d at 672, 675). Both also analogized the strong interest in residential privacy recognized in *Frisby v. Schultz*, 487 U.S. 474 (1988), to medical privacy, noting that targeted picketing of a medical clinic threatened not only the psychological but the physical well-being of the patient held "captive" by medical circumstance. (App. 12a, n.6, 11a-16a; 626 So. 2d at 667; *see also* 114 S. Ct. at 2526).

Notwithstanding the similarities between both the facts and decisions in these cases, petitioners argue that the sidewalk restriction in this case "cannot be justified as necessary to preserve access to the facility," and hence *cannot be justified at all* under *Madsen*. This argument is untenable. The Court in *Madsen* held that the interest in protecting "*unfettered* ingress to and egress from the clinic" justified the 36-foot buffer zone. (114 S. Ct. at 2527) (emphasis added). It did not say that such a zone was justified only to avoid a complete blockade of the clinic; nor, indeed, was there evidence in *Madsen* that petitioners had ever blocked access completely.[3] Rather, they were engaging in the same tactics —

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3. The findings of the trial court in *Madsen* clearly reveal that the problem (Cont'd)

slowing vehicles, thrusting literature through windows, and accosting and harassing patients and staff on their way into and out of the clinic — employed in this case.[4]

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was not denial of access but interference with access:

> The interference to ingress has taken the form of persons on the paved portions of Dixie Way, some standing without any obvious relationship to others; some moving about, again without any obvious relationship to others; some holding signs, some not; some approaching, apparently trying to communicate with the occupants of motor vehicles moving on the paved surface; some marching in a circular picket line that traversed the entrance driveways to the two parking lots of the petitioners and the short section of sidewalk joining the two parking lots and then entering the paved portion of the north lane of Dixie Way and returning in the opposite direction. Other persons would be standing, kneeling and sitting on the unpaved shoulders of the public right-of-way. As vehicular traffic approached the area it would, in response to the congestion, slow down. If the destination of such traffic was either of the two parking lots of the petitioners, such traffic slowed even more, sometimes having to momentarily hesitate or stop until persons in the driveway moved out of the way. (626 So. 2d at 667).

4. In *Madsen*, the trial court described these tactics as follows:

> As traffic slowed on Dixie Way and began its turn into the clinic's driveway, the vehicle would be approached by persons designated by the respondents as sidewalk counselors attempting to get the attention of the vehicles' occupants to give them anti-abortion literature and to urge them not to use the clinic's services. Such so-called sidewalk counselors were assisted in accomplishing their approach to the vehicle by the hesitation or momentary stopping caused by the time

(Cont'd)

These activities, the California Supreme Court found, forced clinic patients into emotionally jarring confrontations with pickets and "sidewalk counselors" as they attempted to enter or leave the clinic, creating stress and anxiety that posed potentially significant health risks for those about to undergo surgery or other medical procedures. Thus, while patients may not have been physically barred from entering or leaving, they were forced — as in *Madsen* — to subject themselves to a gauntlet of protest activities, with its attendant emotional trauma and adverse physical effects, as a condition to obtaining access to the clinic. (App. 18a, 626 So. 2d at 672). Those that chose not to subject themselves to these stresses were effectively denied access; those that did, underwent the risk that the emotional trauma engendered by the forced physical encounters would undermine the safety of the medical procedure. Additionally, as the Court in *Madsen* noted, patients who were turned away because of the crowd but chose to return at a later date potentially increased their health risks by reason of the delay. (114 S. Ct. at 2521).

Thus whether the governmental interest is described as "protecting *unfettered* ingress or egress" as in *Madsen* or as "safeguarding the health and safety of the clinic's patients" as in this case, the fundamental principle is the same in both cases, namely ensuring that patients do not have to submit to delay and harassment by protesters as a condition to obtaining access to medical care.

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needed for the picket line to open up before the vehicle could enter the parking lot. (626 So. 2d at 667-68).

In this case, the court observed that "[o]ne of the tactics of the sidewalk picketers was to walk slowly across the driveway entrance, thereby delaying cars attempting to turn into the lot. As the cars drove in, the protesters would approach and surround the car, attempting to pass literature through the windows even as they were being rolled up." (App. 3a).

Moreover, even if the governmental interest described by the California court is not coextensive with the interest identified in *Madsen*, this does not mean that this decision cannot stand, as petitioners contend. While this Court in *Madsen* cited the interest in protecting unfettered access as sufficient to justify the 36-foot buffer zone, it did not say that this was the *only* interest that could support such a restriction. Indeed, the Court clearly acknowledged the validity and importance of the governmental interests in protecting the freedom to seek lawful medical services and counseling and in restricting "targeted picketing of a hospital or clinic [that] threatens not only the psychological, but the physical well-being of the patient held "captive" by medical circumstance." (114 S. Ct. at 2526). The Court found these interests to be among those that were "quite sufficient to justify an appropriately tailored injunction." (*Id.*). It is those interests that the California court relied on here.

III.

THE PLACE RESTRICTION ADVANCED THE SIGNIFICANT GOVERNMENTAL INTEREST IN SAFEGUARDING THE HEALTH AND SAFETY OF PATIENTS SEEKING MEDICAL CARE.

Petitioners contend that the injunction cannot be justified as necessary to prevent "emotional trauma." (Petition at 11). This is disingenuous. It was not "emotional trauma" *per se* that the California court identified as the principal concern; it was the impact of such trauma on the integrity and safety of the medical care and procedures provided at the clinic.

The California court began its analysis with the familiar principle that the reasonableness of content-neutral restrictions on speech depends heavily on the "nature of a place [and] 'the pattern of its normal activities. . . .' The crucial question is whether the manner of expression is basically incompatible with the normal

activity of a particular place at a particular time." *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972). (App. 13a). It concluded that the same principle that sustained the regulation of disruptive expression outside of schools (*Grayned*), courthouses (*Cox v. Louisiana*, 379 U.S. 559 (1965)), and homes (*Frisby v. Schultz*, 387 U.S. 474 (1988)), defined an equally substantial interest in restricting conduct incompatible with the health and safety of patients in a medical facility. (App. at 12a). The court noted that this Court had explicitly recognized the significant interest in protecting hospital patients from disturbance in *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978), and other cases. (App. 12a-13a).

The court reasoned that the state's interest in protecting the health and safety of patients seeking medical care extended beyond the operating room. (App. 14a). It pointed out that physical or emotional intimidation of patients outside of the doctor's office could significantly affect their course of treatment once inside. (*Id.*). Such emotional trauma, the court observed, could result in inaccurate blood pressure readings or incomplete medical histories and could complicate counseling, delay treatment, increase health risks and prolong recovery. (App. 16a).

The findings of fact adopted by the trial court "reveal that it was precisely the health and well-being of the clinic's patients that constituted the court's primary concern." (App. 15a). The trial court found that the petitioners' activities — including confronting and intimidating patients, forcing "counseling" and replicas of plastic fetuses on them, interfering with and obstructing access to and from the clinic, and pursuing patients to their cars or to the bus stop — had caused patients seeking counseling or medical services to become emotionally distraught. (App. 45a, 15a-15b). One of the principal purposes of the trial court's place restriction

> was thus to constrain petitioners' confrontational tactics and thereby limit the

> physical intimidation of, and resulting emotional trauma to, the clinic's patients. Added to the stress that normally accompanies any medical treatment, the strain of being pursued and harried by anti-abortion pickets and sidewalk "counselors," however well-meaning, could result in serious medical problems.

(App. 16a).

Hence, the court's concern was clearly not, as petitioners claim, emotional trauma alone, but the fact that such trauma was occurring immediately outside of a medical facility and thus presented potentially serious health and safety risks for those undergoing treatment and surgery inside the facility.

IV.

THE PLACE RESTRICTION DID NOT BURDEN MORE SPEECH THAN NECESSARY TO ACCOMPLISH ITS LEGITIMATE OBJECTIVES.

The place restriction in this case, like the 36-foot zone in *Madsen*, required the petitioners to move to the other side of the street and away from the sidewalk and driveways where the trial court found they had repeatedly impeded, confronted, and intimidated clinic patients. Petitioners characterize the decision as "nothing less than a rationale for excluding *all* pro-life speech from *all* public sidewalks or property." (Petition at 8). This tendentious characterization ignores the history of the case and the California Supreme Court's careful review to ensure that the injunction did not unnecessarily interfere with petitioners' speech rights.

At the preliminary injunction stage, the court had entered a

narrower restriction, allowing picketing on the sidewalk adjacent to the clinic, but limiting the number of pickets to four and requiring two of such picketers to maintain a ten-foot distance from the other two. (App. 4a). At trial, however, the court heard evidence that picketers on the sidewalk were violating the preliminary injunction, necessitating the presence of police to enforce its terms. (App. 4a, n.2). The court also heard testimony that petitioners were surrounding, following and harassing clinic patients on the sidewalk. (App. 4a-5a, 45a). On one occasion, the picketers surrounded a patient and attempted to force literature on her as she sat on the sidewalk curb; Planned Parenthood staff had to disperse the group. (App. 16a).

The trial court thus had before it undisputed evidence of conduct by the protesters that impeded and subjected a captive audience to abuse and intimidation as they attempted to secure access to medical care and counseling and thereby raised the risk of medical complications and injury. The court was faced with the task of crafting an injunction that preserved the interests in unfettered access to a medical facility and the health and safety of clinic patients as well as the protesters' rights to communicate their desired message, all in the context of a unique configuration of narrow sidewalk islands, interspersed with driveways. The court was also required to take into account the special problems posed by emotionally charged encounters between people in vehicles and on foot. Under these circumstances, in fashioning the place restriction so as to confine petitioners' picketing and related activities to the sidewalk opposite the clinic, the court did not burden more speech than necessary to preserve the identified interests.

After conducting a *de novo* review of the record, the California Supreme Court carefully considered the competing interests at stake and evaluated potentially less restrictive means of protecting the identified governmental interest; only then did it uphold the place restriction as narrowly tailored to effectuate the

health and safety interest under the unique circumstances of this case. In reaching this conclusion, the court was guided by this Court's statement in *Schaumburg v. Citizens For a Better Environment*, 444 U.S. 620, 637 (1980), that the means chosen to advance the interest must not "unnecessarily interfer[e] with First Amendment freedoms." (App. 17a).

The fact that the court did not *explicitly* determine that the restriction burdened no more speech than necessary does not undermine the validity of the decision. Nothing in the court's opinion or the record suggests that the restriction went beyond what was necessary to preserve the governmental interest in health and safety.[5] The appropriate scope of injunctive relief in cases such as this, as the court recognized, naturally depends on "the

5. The fact that the place restriction precluded all picketing and protest activity on the sidewalk fronting the clinic does not mean the restriction burdened more speech than necessary. The 36-foot zone upheld in *Madsen* likewise prohibited all such activity. (114 S. Ct. at 2526). Even under the new standard articulated in *Madsen*, therefore, the key issue remains not whether the restriction on speech is *intrinsically* narrow or limited in scope but whether it targets and eliminates no more than the exact source of the "evil" it seeks to remedy. *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 808-810 (1984). The Court in *Vincent* upheld a complete ban on all signs on public property based on the governmental interest in avoiding visual clutter and blight. It sustained the prohibition as narrowly tailored because "the substantive evil — visual blight — [was] not merely a possible by-product of the activity, [it was] created by the medium of expression itself." *Id.* at 810.

In this case, the "substantive evils" — harassment and intimidation of a captive audience and attendant health and safety risks — were created by the presence and activities of petitioners on the sidewalk. Here, as in *Vincent*, the medium of expression — the very presence and proximity of the picketers — created the evil sought to be remedied. The place restriction therefore targeted and eliminated no more than the exact source of the evil it sought to remedy. As the California Supreme Court stated, "the Constitution does not guarantee petitioners the right to create, in effect, a captive audience by cordoning off an area of the sidewalk and allowing no one to pass who did not agree to listen to their message." (App. 12a, n.6).

particular facts and geographic circumstances presented." (App. 19a). The particular facts and geography in this case included very narrow sidewalks surrounding the only driveway access to the clinic, such that even a few protesters could easily impede and harass anyone attempting to enter or leave the clinic property, whether by vehicle or on foot.[6] The court determined that the trial court, in crafting the injunction, "was guided by the paramount need to maintain an atmosphere around the clinic conducive to the health of the patients and its normal medical functions," and that confining the demonstrations to an alternative site across the street responded most effectively to this need. (App. 18a).

In reaching this conclusion, the court evaluated and rejected the potentially less-restrictive alternative of allowing a limited number of protesters on the sidewalk. This alternative, of course, had already been tried by the trial court at the preliminary injunction stage and had not worked to its satisfaction. Moreover, as the high court pointed out, merely restricting the number of protesters in front of the clinic would not necessarily mitigate the emotional impact — and consequent medical risk — on women "forced to navigate even a limited number of pickets and sidewalk 'counselors.' " (App. 20a). Nor, the court observed, would merely keeping the sidewalks free for passage "address the problem identified by the trial court of protesters hounding and upsetting unwilling listeners." *(Id.)*. The court concluded that:

> In these unique circumstances, the trial court was eminently justified in concluding that the protesters' proven confrontational tactics posed an intolerable threat to the emotional

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6. As the appellate court noted, the configuration of narrow sidewalks surrounding the clinic driveway was such that a handful of protestors could easily block pedestrian traffic on the sidewalk. (App. 55a). Moreover, witnesses testified that picketers would walk so slowly across the driveway leading to the clinic parking lot as to effectively impede or delay vehicles attempting to turn into the clinic parking lot. *(Id.)*.

> health and safety of the patients, whether those tactics were resorted to by two or twenty. . . . Substantial evidence from the hearing on the permanent injunction established that the state's interest in protecting the patients required the preclusion of face-to-face, physical confrontations with the protesters.

(App. 20-21a, n.10).

The court determined that the alternative site across the street from the clinic afforded petitioners a vantage point from which to picket and demonstrate that was reasonably close to the clinic and within plain view of their target audience. (App. 23a). It noted that "petitioners do not contend that their signs cannot be seen or that their presence and views cannot readily be perceived by persons entering or leaving the clinic." *(Id.)*.

The court's reasoning is fully consistent with the analysis in *Madsen*. There, this Court pointed out the limited options available to the trial court given the narrow confines around the clinic. (114 S. Ct. at 2527). There, as here, the "state court was convinced that allowing the petitioners to remain on the clinic's sidewalk and driveway was not a viable option in view of the failure of the first injunction" to accomplish its goals. *(Id.)*. The Court noted that the "failure of the first order to accomplish its purpose must be taken into consideration in evaluating the constitutionality of the broader order." *(Id.)*. The Court concluded that while the need for a complete buffer zone near the clinic entrances and driveway might be debatable, "some deference must be given to the state court's familiarity with the facts and the background of the dispute between the parties even under our heightened review." *(Id.)*. It held that "[o]n balance, . . . the 36-foot buffer zone around the clinic entrances and driveway burden[ed] no more speech than necessary to accomplish the governmental interest at stake." *(Id.)*. The same conclusion is warranted here.

V.

BECAUSE THE CALIFORNIA SUPREME COURT'S DECISION IS CONSISTENT WITH BOTH THE REASONING AND THE RESULT IN *MADSEN*, THERE IS NO BASIS FOR VACATING AND REMANDING THE DECISION FOR FURTHER CONSIDERATION IN LIGHT OF *MADSEN*.

The injunction imposed by the trial court and upheld by the California Supreme Court satisfies the standard articulated in *Madsen*. Accordingly, there is no need to remand for further consideration in light of *Madsen*. Given the facts and reasoning of this case, the state court should, and no doubt would, reach precisely the same result after remand.

The summary reversal and remand issued by this Court in *Reali v. Feminist Women's Health Center*, 114 S. Ct. 2776 (1994), has no bearing on a remand in this case. In *Reali*, the Court of Appeal justified the breadth of an injunction only in terms of a woman's *privacy right* to effectuate an abortion decision; the use of the free zone was upheld as "narrowly tailored to protect the patients' privacy interests." *Feminist Women's Health Center v. Blythe*, 17 Cal. App. 4th 1543, 1559-60 (1993). While the court explained that certain health and safety risks engendered by the protesters' activities justified the issuance of *an* injunction (*id.* at 1555), it did not analyze the breadth of the injunction as it related to the elimination of those risks. *Id.* at 1556-61. In light of *Madsen*, it was not sufficient for the court simply to identify health and safety concerns as a legitimate state interest to be protected; further consideration was required to determine whether the injunction burdened more speech than necessary to protect the identified interest. The California Supreme Court's decision in this case, however, contains no such defect.

CONCLUSION

The thrust of petitioners' argument is that because *Madsen* announced a heightened standard of scrutiny for injunctions limiting speech in a public forum, any injunction issued prior to *Madsen* will necessarily burden too much speech because the court will have applied the traditional time, place and manner standard. In fact, however, the outcome in each case will depend on the location, nature and impact of the protest activities, the breadth of the injunction and the governmental interest supporting the injunction. In light of the close similarities between the facts and reasoning in the two cases, this case is not one that warrants rethinking in light of *Madsen*. Respondent respectfully requests that the petition be denied.

Dated: October 7, 1994

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

CHRISTINE WILLIAMS and CITIZENS FOR LIFE,
Petitioners,

v.

PLANNED PARENTHOOD SHASTA-DIABLO, INC.,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of California

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REPLY BRIEF FOR PETITIONERS

ARGUMENT

The decision of the Supreme Court of California plainly requires reversal, or vacation and remand, in light of this Court's intervening decision in *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994). *Accord Reali v. Feminist Women's Health Center*, 114 S. Ct. 2776 (1994) (summarily granting review, vacating decision below, and remanding for further consideration in light of *Madsen*);[1] *Lawson v. Murray*, 63 U.S.L.W. 3256 (U.S. Oct. 3,

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[1] *Reali* involved an injunction imposing a smaller "speech-free zone" than the one upheld in the present case. *See Feminist Women's Health Center v. Blythe*, 17 Cal. App. 4th 1543, 22 Cal. Rptr. 2d 184 (1993) (zone extending 20 feet on each side of front entrance), *vacated*, 114 S. Ct. 2526 (1994). Accordingly, the need to vacate the judgment in the present case is even more compelling.

1994) (No. 94-45) (same). The decision below also conflicts with a decision of the Second Circuit issued subsequent to the filing of the petition for certiorari in this case. *See Pro-Choice Network of Western New York v. Project Rescue Western New York,* Nos. 92-7302, 93-7918 (2d Cir. Sept. 6, 1994) (1994 WL 480642) (overturning, as unconstitutional, injunctive creation of 15-foot "bubble zones" outside abortion businesses). This Court should therefore grant the present petition.

1. Conflict with *Madsen*

In this case the state supreme court upheld an injunction forbidding all "picketing, demonstrating or counseling" on the public sidewalk adjacent to respondent's abortion facility. Applying the "time, place, and manner" test, Pet. App. 6a-7a, and declaring that "the critical issue was not access," *id.* at 21a n.10, the court upheld the injunction as narrowly tailored to "mitigate the emotional impact" of petitioner's expressive activities on respondent's clientele, *id.* at 20a. In *Madsen*, by contrast, this Court *rejected* the use of the "time, place, and manner test" for injunctions, 114 S. Ct. at 2525, *rejected* restrictions on even "insulting" and "outrageous" speech, *id.* at 2529, and *rejected* a "buffer zone" insofar as that zone was not "necessary to protect *access* to the clinic," *id.* at 2528 (emphasis added).

In short, the decision below is thoroughly irreconcilable with this Court's decision in *Madsen*.

Respondent Planned Parenthood Shasta-Diablo, Inc. (PP) cannot seriously dispute this conflict with *Madsen*. PP admits that the court below used "a less stringent standard than the one adopted in *Madsen,*" Opp. at 8 (heading), concedes that "patients may not have been physically barred from entering or leaving," *id.* at 12, and acknowledges that the decision below rests upon a concern with avoiding the *potential* effects of the "emotional impact" of encounters between PP's patrons and "even

a limited number of pickets and sidewalk counselors," *id.* at 18; *see also id.* at 14-15.

PP tries to defend the decision below by arguing that the decision would not justify "excluding *all* anti-abortion speech from *all* public sidewalks or property adjacent to abortion clinics," Opp. at 1 (editing marks and citation omitted). Yet PP fully embraces the reasoning of the court below that "the very presence and proximity of the picketers" and counselors, *id.* at 17 n.5, even in limited numbers, *id.* at 18, posed an "intolerable threat to the emotional health and safety of the patients," *id.* at 18-19 (quoting court below). Obviously, this faulty reasoning—equating mere "presence" with an "intolerable threat" to "emotional health"—would support a total ban on all pro-life speech outside abortion businesses.

PP, like the court below, would uphold the "preclusion of face-to-face, physical confrontations with the protesters," Opp. at 19 (quoting court below). In essence, both PP and the court below assert that speech limits must yield, not just to the preservation of "unfettered access," *Madsen*, 114 S. Ct. at 2527, but to the maintenance of *emotionally sheltered* access, *see, e.g.*, Pet. App. 10a (court below describing injunction as "effectively insulating the clinic's patients and staff" from contact with petitioners).

This logic is anathema both to the *Madsen* decision in particular and to First Amendment jurisprudence in general. Many traditional forms of free speech involve "face-to-face, physical confrontations"—i.e., personal contact. *E.g., Meyer v. Grant*, 486 U.S. 414, 424 (1988) (circulating petitions; "the most effective, fundamental, and perhaps economical avenue of political discourse [is] direct one-on-one communication"); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (accosting strangers and challenging their religious beliefs); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (stationing "store watchers" outside boycotted businesses); *Thornhill v.*

Alabama, 310 U.S. 88 (1940) (picketing outside business); *Lovell v. Griffin*, 303 U.S. 444 (1938) (leafletting). Indeed, in the precise context of abortion protest, this Court affirmed the fundamental axiom of free speech that, "[a]s a general matter, . . . in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment." *Madsen*, 114 S. Ct. at 2529 (internal quotation marks and citation omitted).

PP tries to defend the decision below on the basis of supposedly "unique circumstances." Opp. at 18 (quoting court below). But the "unique" feature of this case consists not of the *facts*—typical picketing and leafletting [2] on a typical sidewalk [3]—but rather the *legal* holding that suppressed expressive activities even where "the critical issue was not access," Pet. App. 21a n.10.

2. Conflict with the Second Circuit

The decision below also conflicts sharply with the very recent, post-*Madsen* decision of the Second Circuit in *Pro-Choice Network of Western New York v. Project Rescue Western New York*, Nos. 92-7302, 93-7918 (2d

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[2] PP repeats the misleading claim that the number of protesters varied from a handful to "over 100." Opp. at 3, 9; *id.* at 4. As petitioners have already explained, the usual number of pro-life individuals present was about eight; only on one occasion—on a weekend, when no abortions were scheduled—were there almost one hundred people present. Pet. at 3 n.1. PP does not dispute this fact.

[3] PP describes the sidewalks as "very narrow" because "even a few protesters could easily impede" passage. Opp. at 18. But the appellate court described the sidewalk as appearing to be "four to six feet wide," Pet. App. 55a n.3—not an unusually small dimension. Furthermore, the claim that "even a few protesters" *could* block a sidewalk would be true of all but the most spacious sidewalk promenades. The First Amendment is not limited to such exceptional locales.

Cir. Sept. 6, 1974) (1994 WL 480642) (hereinafter *P.C. Network*).

In *P.C. Network*, the Second Circuit struck down as unconstitutional a speech-free "bubble zone" extending fifteen feet from the entrances and driveways of an abortion business. Applying "the *Madsen* test," slip op. at 20, the court of appeals noted that the 15-foot zone "apparently forbids conduct even beyond that which would obstruct or impede access. For example, . . . the injunction . . . prohibits a defendant from standing on a sidewalk in front of the clinic, within fifteen feet of the entrance, holding a sign imprinted with an antiabortion message." *Id.* at 22. Moreover, "the need for this prohibition . . . is not established on this record," *id.* (The record included some six findings of contempt for violating a previous injunction. *Id.* at 22-23.) In contrast with *Madsen*, the court explained, there was "no indication that the . . . violations were so pervasive as to undermine the . . . general goal of ensuring access to abortion facilities." *Id.* at 23-24. The Second Circuit concluded that "unless and until the record supports a finding that the prohibition against obstructing or impeding access to the facilities is ineffective to protect access, the bubble zone provision does not pass constitutional muster." *Id.* at 24.

In the present case, the Supreme Court of California did not even pretend that the injunction was necessary to ensure access. Instead, the court approved the injunction as a means for emotionally insulating PP's clientele. "[M]erely keeping the sidewalks free for passage does not address the problem of protesters hounding and upsetting unwilling listeners." Pet. App. 20a. But as the Second Circuit observed, this rationale is constitutionally suspect: "an injunction's purpose of avoiding stress to prospective clinic patients . . . might constitute a justification that impermissibly refers to content." *P.C. Network*, slip op. at 19. *Accord Madsen*, 114 S. Ct. at 2529 (noting that an intent "to reduce the level of anxiety and hypertension suffered by the patients," by prohibiting "images observ-

able" to the patients, could only plausibly rest on the rationale that patients "found the expression contained in such images disagreeable").

The decision below, upholding an injunction that was admittedly not necessary to ensure access, plainly could not survive review in the Second Circuit.

CONCLUSION

The First Amendment does not countenance the prohibition of speech in the name of preventing emotional upset. As this Court has observed, "if absolute assurance of tranquility is required, we may as well forget about free speech." *City of Houston v. Hill,* 483 U.S. 451, 462 n.11 (1987) (editing marks and citation omitted).

The decision below, issued prior to *Madsen,* cannot survive *Madsen.* Furthermore, the decision below conflicts with a post-*Madsen* decision of the Second Circuit. This Court should grant this petition and either summarily reverse the decision below or vacate that decision and remand for further consideration in light of *Madsen.* In the alternative, this Court should grant this petition and set the case for plenary review.

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